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THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1884:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

The Court of Appeal, the Court for Crown Cases Reserved and the Court of Bankruptcy;

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

Chancery; Queen's Bench; and Probate Divorce and Admiralty, Divisions.

MICHAELMAS 1883 TO MICHAELMAS 1884.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases: viz., the Privy Council Volume; the Chancery and Bankruptcy Volume; the Queen's Bench or Common Law Volume, including Bankruptcy; the Probate, Divorce, and Admiralty Volume; and the Magistrates' Cases.

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THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY

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CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Division

OF THE

HIGH COURT OF JUSTICE,

REPORTED BY

W. DECIMUS I. FOULKES, J. H. ETHERINGTON SMITH,
GILBERT GEORGE KENNEDY, RICHARD HOLMDEN AMPHLETT,
FRANCIS PARKER, EDWARD BENNETT CALVERT,
AND GEORGE HUMPHREYS,
BARRISTERS-AT-LAW;

AND ON APPEAL THEREFROM

IN

Her Majesty's Court of Appeal,

REPORTED BY

ARTHUR CLEMENT EDDIS, ROBERT BRUCE RUSSELL,
WILLIAM EDWARD GORDON, GEORGE ABBOTT STREETEN,
AND EDWARD NASH,
BARRISTERS-AT-LAW,

AND IN

The House of Lords,

REPORTED BY

LIONEL LANCELOT SHADWELL,
BARRISTER-AT-LAW.

MICHAELMAS 1883 TO MICHAELMAS 1884.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Queen's Bench Division

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1883 TO MICHAELMAS 1884.

47 Victoriæ.

[IN THE COURT OF APPEAL.]

1883. Nov. 10. } THWAITES *v.* WILDING AND ANOTHER.*

Landlord and Tenant — Distress on Goods of Lodger for Rent due from Tenant —Declaration under Lodgers' Goods Protection Act (34 & 35 *Vict. c.* 79)*—Renewal of Declaration upon Second Distress.*

A landlord having seized the goods of the plaintiff, who was a lodger under his immediate tenant, for rent due from the immediate tenant, the lodger served him with a declaration under the Lodgers' Goods Protection Act, stating that the goods were hers and that she owed no rent to the immediate tenant. The landlord withdrew the distress, making an arrangement with his tenant by which the tenant paid part of the rent due and promised to pay the remainder by weekly instalments. The tenant did not pay the instalments or the weekly rent accruing due, and the landlord shortly after distrained the same goods for the whole sum then due to him from his tenant. The lodger did not give a fresh declaration under the Act, and her furniture was sold. In an action by her for trespass to her goods,—Held, *affirming the judgment of the Queen's Bench Division, that the plaintiff could not recover; that the declaration given on the occasion of the first distress did not protect her goods against the second distress by the landlord; and that the second distress was not illegal at common law, because there had not been any voluntary abandonment by the landlord of the first distress.*

Appeal from the judgment of the Queen's Bench Division giving judgment for the defendants, reported 52 Law J. Rep. Q.B. 734.

Action for trespass to the plaintiff's goods in distraining them for rent due from Stephen Thwaites to the defendant Wilding, the plaintiff being a lodger in one of the rooms let by the defendant Wilding to S. Thwaites.

At the trial before Mathew, J., it appeared that the defendant Wilding let part of a house to Stephen Thwaites at 10*s.* a week. On the 1st of September, 1882, Thwaites owed rent to the amount of 8*l.*, and the defendant Wilding employed the defendant Hancock to distrain for that amount and costs. The plaintiff Jane Thwaites occupied one of these rooms as a lodger under Stephen Thwaites. She claimed to be the owner of some of the goods seized, and on the 5th of September she served the defendants with a declaration duly made under section 1 of the

* *Coram* Brett, M.R., and Bowen, L.J.

Lodgers' Goods Protection Act, 34 & 35 Vict. c. 79 (1). On the 6th of September the defendant Wilding agreed with his tenant, Stephen Thwaites, that he would withdraw from possession on payment by the tenant of 1*l.* on account of the arrears, and on his undertaking to pay the remainder of the sum due by weekly instalments of 10*s.* each. The tenant failed to pay either the weekly instalments of 10*s.*, or the accruing rent, and on the 21st of September the landlord again seized by the same broker the same goods for the amount then due, which was 8*l.* The plaintiff's goods were then sold. She made no declaration under the statute upon this second seizure; but it was sworn that she had paid all the rent due from her to Stephen Thwaites down to the date of the second seizure.

The learned Judge ruled that, as the second distress had been put in for an amount for which the first distress had been levied, it was illegal within the Act, if the jury thought the plaintiff was a lodger, and that the defendant had withdrawn after notice of that fact had been given to him; and that, notwithstanding further rent had accrued due, the second distress was not lawful, inasmuch as it was levied for the amount of the first, *plus* 20*s.* which had accrued due afterwards.

A rule *nisi* for a new trial on the ground of misdirection having been obtained, the Queen's Bench Division, on the argument, gave judgment for the defendants.

The plaintiff appealed.

McClymont and *Shearman*, for the appellant.—The plaintiff was entitled to the protection of the statute when the second distress was made, for she had made a declaration in pursuance of the Act when the first distress was put in; and as the same landlord seized the same goods for the same rent it was not necessary for her to make a fresh declaration on the occasion of the second distress in order to obtain the protection of the statute. If a landlord is once fixed with notice by a declaration under section 1 of the Act (1), he cannot then distrain the goods comprised therein without having to prove that the goods do not belong to the lodger who makes the declaration.

Further, if a second declaration was required, still the plaintiff is entitled to recover, because there was a voluntary abandonment of the first distress by the landlord, so that the second distress was wholly illegal—*Dawson* v. *Cropp* (2).

[BRETT, M.R.—Is it not clear that 8*l.* was due on the occasion of the first distress, that 1*l.* was then paid, leaving 7*l.* due, and that a fortnight afterwards two weeks more rent would be due, so that 8*l.* would again be due? If this is so, then the second distress was for rent partly old and partly new: can it then be urged that it was wholly illegal at common law?]

H. Kisch, for the defendants, was not called on.

BRETT, M.R.—In this case two points arise. The first turns on the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79) (1). It appears that there was a superior landlord who had an immediate tenant, and that tenant had a lodger, who is the plaintiff in this action. On a certain day

(1) 34 & 35 Vict. c. 79. s. 1: "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour."

(2) 1 Com. B. Rep. 961; 14 Law J. Rep. C.P. 281.

in September 8*l.* was due for rent from the tenant to the landlord, and thereupon the landlord distrained both the goods of the immediate tenant and those of the lodger. The plaintiff thereupon made a declaration in accordance with the requirements of the statute 34 & 35 Vict. c. 79 (1).

In that declaration the plaintiff stated that certain of the goods distrained upon belonged to her, and that no rent was due from her to S. Thwaites, the immediate tenant; and it is admitted that that declaration was in all respects true and valid, so that the plaintiff did with respect to that distress everything which was necessary to secure for her the protection of the statute. It then became the duty of the landlord to withdraw, and he did withdraw, so that in respect of that seizure the lodger obtained the protection of the statute; but she did not thereby acquire any right of action against the landlord. The landlord withdrew the distress against the goods of the tenant as well as from the goods of the lodger. It is said that there was a dispute as to the manner in which this withdrawal was effected; but I do not think there can really be any doubt as to the terms upon which the landlord withdrew from the distress levied on the goods of the tenant. At that time the tenant owed the landlord 8*l.* for arrears of rent, and the tenant agreed to pay 1*l.* down and 10*s.* each week as instalments of the 7*l.* still remaining due if the landlord would withdraw from the distress. This agreement being come to, the tenant was in future bound to pay 1*l.* a week—10*s.* the weekly rent accruing due, and 10*s.* the weekly instalment of the arrears. It is clear that this was the arrangement entered into; but the tenant failed to make any payment to the landlord, and the position of affairs on the 21st of September was that the amount of the arrears—that is, 7*l.*—was still due, and at least a fortnight's rent had accrued due; so that 8*l.* was again due to the landlord, although 1*l.* of that sum had accrued due since the distress already referred to had been withdrawn. The landlord entered again, and again seized the goods both of the tenant and of the lodger; so that he seized the same goods as before, and that at a time when no rent was due from the lodger to the immediate tenant. The lodger did not then give any fresh notice or make any fresh declaration within the statute; but, relying on the previous declaration, she has brought an action for trespass to her goods on the ground that they were protected by the provisions of the statute against this second seizure by the landlord. In addition to the point raised upon the statute, the plaintiff maintains further that, even if the statute does not apply, yet she is entitled to sue the defendant because he was not at that time entitled to distrain upon the goods of his immediate tenant, and therefore that she is entitled to bring an action for the wholly unauthorised seizure of her goods by the landlord and his broker.

The first point is whether these goods were protected by the statute—that is, whether the declaration made by the lodger on the occasion of the first seizure is applicable to the second seizure; and for this purpose it must, as it seems to me, be assumed that the second seizure was a legal seizure at common law. The question then is, whether in this case, where no declaration was made before any levy under the second seizure, or after the second seizure was authorised or threatened, the lodger's goods can derive any protection from the statute against a seizure which is a legal seizure at common law. It is clear that a declaration was made by the lodger, and that that declaration was made before the second seizure or sale; but the question is whether it was a declaration within the statute. It seems to me that it was not, and that to make the declaration an effective declaration within the terms of the statute it must be a declaration made after a levy made, or after a levy authorised or threatened, and that a declaration made before any of those conditions have been fulfilled is not a declaration within the meaning of 34 & 35 Vict. c. 79. s. 1. If so, then if there were a second seizure of the same goods there would be no protection given by the statute, unless a new declaration were made after the second levy has been made, authorised or threatened. It is suggested that this construction makes the statute ineffective; but I do not see that that is so: all that it does is to say that lodgers must fulfil the

conditions of the statute before they can claim the protection of the statute.

Then arises the question whether this seizure is one for which the plaintiff can sue without vouching the protection of this statute. She certainly could do so if the seizure had been wholly illegal. I doubt whether she could do so if there had been merely an excessive distress; but it is not necessary to decide this point, as the second distress levied by the landlord was a perfectly legal distress. It was a distress, not for the same rent as that for which he had before distrained, but for a sum which consisted partly of the former sum and partly of a new sum. It is not necessary to decide whether the plaintiff would have any remedy had the distress been excessive, because there was not any voluntary abandonment within the doctrine laid down in *Dawson* v. *Cropp* (2). There was here an agreement as to the terms on which the first distress should be withdrawn, so that the second distress was legal, and the plaintiff has no cause of action. The appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. I think it is clear that the conditions by which the statute enacts that a lodger may relieve himself from the ordinary stress of the common law must be strictly complied with, and that a declaration must be made at the time of each levy. The object of the statute shews, I think, that one declaration will not do for all time; there was both a desire to protect the goods of lodgers, and also a desire to give landlords a correlative benefit in the shape of giving them a claim upon any rent which might be due from lodgers to immediate tenants. The declaration must therefore contain two statements, one that the immediate tenant has no right of property in the goods distrained upon, and the other a statement whether any and what rent is due from the lodger to his immediate landlord. Now it is clear that the property in the goods might vary from time to time, and that the account between the lodger and the immediate tenant might also vary from time to time, and the declaration made under the statute of necessity fixes a date at which its statements are accurate; but those statements may very probably not be in accordance with the facts which may exist at another date.

I agree that it is not necessary to decide whether the declaration would hold good after a threatened distress, for in this case there was a fresh distress, and there was no new declaration made pursuant to the provisions of 34 & 35 Vict. c. 79.

The second point taken is that the landlord had no right at common law to enter the second time and to distrain again. No doubt the law says that a landlord must not split up his demand, and although claiming a gross sum, yet voluntarily abandon part at the time of distress, and enter week by week to seize for a portion of the sum claimed; but that principle does not apply where there has been no voluntary abandonment; and as there was not any voluntary abandonment here, the case is not brought within the doctrines laid down in *Dawson* v. *Cropp* (2) or *Bagge* v. *Mawby* (3). I think that, on referring to the notes of Mr. Justice Mathew, it is quite clear that the arrangement was such as has been described by the Master of the Rolls, and therefore this appeal must fail.

Appeal dismissed.

Solicitors—Weall & Barker, for appellant; Haynes, for respondents.

[IN THE HOUSE OF LORDS.]

1883. June 26, 28. } THE MERSEY DOCKS AND HARBOUR BOARD *v.* LUCAS.

Income Tax—Profits—Statutory Restriction—Corporations.

The appellants, a corporation, created by Act of Parliament for the management of the Mersey Docks, derived a considerable income from dock dues and other payments for dock and harbour accommodation. A local Act appropriated the income to certain enumerated purposes, not including the payment of income tax, and provided that it should not be applied "for any other purpose whatsoever":—Held, *that*

(3) 8 Exch. Rep. 641; 22 Law J. Rep. Exch. 236.

income tax was payable on the profits of the undertaking.

The local Act required the surplus income, after payment of working expenses, interest on debt, and cost of certain authorised works, to be applied in reducing the principal of the debt, and after the extinction of the whole debt the rates levied were to be reduced:—Held, *that such surplus income was profits assessable for income tax.*

The Mersey Docks and Harbour Board appealed from the decision of the Court of Appeal (reported 51 Law J. Rep. Q.B. 114) which reversed one of the Queen's Bench Division (reported 50 Law J. Rep. Q.B. 449).

The facts fully appear in the report in the Queen's Bench Division, and are sufficiently stated in the head-note and judgments of the present report.

Webster, Q.C., and *Bigham*, for the appellants.

The Attorney-General (*Sir H. James, Q.C.*), *The Solicitor-General* (*Sir F. Herschell, Q.C.*), and *A. V. Dicey*, for the respondent, were not called upon.

THE LORD CHANCELLOR (THE EARL OF SELBORNE) (on June 28).—The circumstances under which this case comes before your Lordships are these: The question is, whether income tax is chargeable upon a sum which on the one side is alleged to be the annual profits of the Mersey Docks and Harbour Board of Liverpool, and which is denied on the other side to be of that character. The Queen's Bench Division determined that question upon a ground which I think was practically now abandoned at the bar as untenable: that ground being that in a local Act, the Mersey Docks Act of 1858, the appropriation of the receipts of the dock board is directed: and, after enumerating the purposes there mentioned, these words follow:—"And, except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever." It appears to have been thought by the two learned Judges who took part in the judgment in the Queen's Bench Division that those negative words excluded any application of the moneys to income tax, because, among the enumerated purposes to which the proceeds of the concern were to be applied, income tax was not mentioned. Neither were poor rates, excepting that there was a saving clause that nothing in the Act contained should "alter or affect the question of the liability" "to parochial or local rates." It may be that that is a distinction which, from some points of view, might be of importance with respect to taxes and rates. I find, however, that in advising this House in *The Mersey Docks* v. *Cameron* and *Jones* v. *The Mersey Docks* (1), my noble and learned friend (Lord Blackburn) who then delivered the opinion of the Judges, which was adopted by the House, did not rely upon this special clause which I have just read, but said, "There are no negative words prohibiting the application of the rates to payment of the poor rate; and we think, in conformity with the decision in *The Tyne Commissioners* v. *Chirton* (2), that enactments directing that the revenue shall be applied to certain purposes, and no others, are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue which otherwise might have been disposed of at the pleasure of the recipients shall be applied to these purposes." If it were not superfluous now to express concurrence in an opinion which I think may be taken to have been approved by the House of Lords in 1864, I should express my full concurrence in that opinion; and it has been very candidly admitted at your Lordships' bar that that opinion seems not to have received the attention due to it when this case was before the Queen's Bench Division. But I will add further that, even independently of that sound general doctrine laid down in the passage which I have read from the opinion of the Judges delivered in 1864, it seems to me that the view expressed in the Court of Appeal is perfectly right, and that it would be a very strange thing indeed, and wholly inconsistent with the principles which are well established as to the construction of Acts of Parliament—and, I may say, more especially of local and

(1) 11 H.L. Cas. 443; 35 Law J. Rep. M.C. 1.
(2) 1 E. & E. 516; 28 Law J. Rep. M.C. 151.

personal Acts of this nature—if duties given to the Crown, taxes imposed by the authority of the Legislature, by public Acts for public purposes, were held to be taken away by general words of this kind in a local and personal Act, and an Act in which the Crown is nowhere mentioned as to be bound by it.

For this purpose it seems to me to be quite immaterial whether we regard this question as governed in substance by the Income Tax Acts which were passed before the year 1858, or by the Income Tax Acts, or any of them, which were passed since. If by those passed since, then it would be an extravagant proposition indeed to say that a subsequent public Act imposing duties is not to operate because a prior local and personal Act contained negative words of this kind. But if you look to the Act which had been passed before, to my mind the argument is exactly the same. A public Act had imposed duties. There is not a word in this private Act about those duties, nor taking them away from the Crown; nor could these negative words possibly have that effect. In truth, the income tax stands in the singular position of being in one sense imposed after, and in another sense before, this Act; after, because the present rate of income tax is governed by the continuance Acts, or by the Acts which have varied the rate from time to time, and which are later—but all those Acts refer to the earlier Act and incorporate its provisions; and it is perfectly manifest, as a matter of construction, that what was taxed by the earlier Acts was meant also to be taxed by the later. I think that this was felt at the bar, and the consequence has been that the case has been in substance argued before your Lordships upon other grounds.

Then I come to examine those other grounds. First of all, I think the more convenient method of proceeding is to look at the terms of the Acts before one goes at all beyond them. Now the Income Tax Act that we have to construe expressly imposes the tax upon "the annual value of all the properties hereinafter described," which is to be "understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited." I pause to observe that the later Act, 29 & 30 Vict. c. 36, altered that so far as relates to its being the value for a single year necessarily. That Act said that, for the purpose of assessing the income-tax upon the classes of undertakings to which this particular undertaking belongs, the rules in schedule D were to be applied which were not applied by the Act of the 5 & 6 Vict. Those rules of schedule D allow an average of three years; and in that respect, which is not material upon the present occasion, there is a change. Then it goes on to say that that is to be understood as to the annual value or the yearly profits, amongst other things, of "docks." The tax is to be upon the profits, as I said before, of the year preceding; and it is to be charged, amongst others, upon every "corporation" "carrying on the concern," and it is to be charged "on the amount of the produce or value thereof." What is "thereof"? Of the concern which the corporation carries on. If we had nothing more than that, I should have thought that we were to consider, not the application of the moneys which the Mersey Board received when they had received them, but the "profits of the concern," in the sense of the "produce or value" which could properly be described as "profit of the concern"— and that, surely, would be all the net proceeds of the concern, after deducting the necessary outgoings without which those proceeds could not be earned or received.

But the Act does not stop there; it goes on and says that this charge is to apply "before paying, rendering or distributing the produce or the value, either between the different persons or members of the corporation, company or society engaged in the concern" (those are words which would not apply here, because the proceeds of this undertaking are not so distributable), "or to any creditor or other person whatever having a claim on or out of the said profits." Therefore, so far as these words go, they distinctly exclude from deduction, as regards the question of priority over the tax payable to the Crown, all payments "to any creditor or other person whatever having a claim on or out of the said profits." Now your Lordships

will observe that that proves distinctly that the word "profits" as here used does mean the incomings of the concern, after deducting the expenses of earning and obtaining them, before you come to an application of them even to creditors who are of course creditors of the concern. With regard to this particular case, the whole application in respect of which it is contended that the character of profits is taken away from the subject-matter is application to creditors. This does not say "dividends or interest payable to creditors," but it says "before paying, rendering or distributing the produce or the value" "to any creditor or other person whatever having a claim on or out of the said profits." No doubt it goes on to say that a proportionate deduction of duty is to be allowed by a creditor; that is to say, that the duty which is imposed also upon himself, if paid in this manner by the company and charged upon the company, is to be allowed by him as a deduction in their favour; but that does not take away from the force of the generality of the words which precede it, and which say that no deduction is to be allowed in respect of the application of the "said profits," in the sense I have mentioned, to any creditor or other person having a claim upon them.

Now, I should have said that that is quite sufficient to settle the whole matter, because it shews that in these cases you are to charge the corporation or company upon its entire net receipts for the purpose of duty, and to disregard every application which may have to be made, whether in favour of creditors or others, of any part of those receipts. It is clear that in this case it is not under the later section that the officers of the company pay other men's income tax, but they pay their own, and in paying their own they cover to a certain extent that of other men, and therefore they are permitted to deduct it.

But I will go further, and say that it appears to me that the rules in schedule D, which are introduced and made applicable by the later Act, entirely confirm this view, which is the natural and *prima facie* view of the meaning of the words which I have read, which apply to the earlier schedule. When we come to the later schedule D, the rules of which are by the later Act applied to this particular class of undertakings, the same reasoning is confirmed. The rules are these:—"First case. Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade not contained in any other schedule of this Act." "First, the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern." I pause there to observe, that although in the Act of Parliament "profits" and "gains" are really equivalent terms, yet the use of the word "gains" in addition to the word "profits" furnishes an additional argument for excluding the contention of the appellants, that you are to introduce into the word "profits" some ideas connected, not with the nature of the thing, but with the manner and rule of its application. What are the gains of a trade? If it could be reasonably contended that the word "profits" in these Acts has reference to some advantage which the persons carrying on the concern are to derive from it, it might be said, perhaps, that the same argument might have been raised upon the word "gains"; but, to my mind, it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purpose it is used—whether it is gained for the benefit of a community, or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is all the same.

Then the schedule goes on to say that it allows an average of three years to be taken, where the business has been carried on for three years; and then it says that it "shall be assessed, charged and paid, without other deduction than is hereinafter allowed." So that the Act specifies what deductions are to be allowed. The first part of the Act has excluded deductions for creditors and persons having claims, and this goes on to allow some particular deductions which are not material here, and also to speak of some that are not to be allowed. "Third. In estimating the balance of profits and gains

chargeable under schedule D, or for the purpose of assessing the duty thereon,"—first, no sum shall be deducted "for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern"; then, secondly, "nor for any sum expended for the supply of repairs," or keeping up the plant and stock in trade, beyond what has been usually expended on the average of three years. That, at all events, goes strongly against the notion that you are to go a-field and enquire into the benefits to be derived by one person or another, and the mode of deriving them, in the manner which the argument at the bar requires. Then it goes on to say, "Nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure or concern." That is to say, no addition to capital, no improvements made out of capital, at all events of premises, are to be allowed; and although all those particular things are enumerated, yet they are enumerated after a general provision that the tax is to be paid without any other deduction than that which is afterwards allowed. It is therefore quite impossible that, according to the principle of the Income Tax Acts, these payments to creditors can be taken into consideration.

Then what remains of the argument? Merely this, that a local and personal Act has regulated the application of the gross receipts of the undertaking, and has said that they may be applied to the expenses of collection, to the payment of interest—which, it is admitted (at least it must be admitted), is excluded by the Income Tax Act from being taken into account—then to the construction of works, which would fall within the principle of some of those deductions which are expressly excluded by schedule D, and in supporting and maintaining the works and the general management of the estate, and all reasonable expenses for maintaining and protecting the same; and then in extinguishing debt, and ultimately the rates are to be reduced. Those applications may be made by the board "in any order with respect to priority of such application as they shall deem expedient"; and it is quite plain, when you look at it, that some of them are expenses which must be incurred in order to earn any gain or profit from the undertaking, and others of them are application of the gain or profit when earned. The expenses of the general management of the estate, and the expenses and charges of collecting rates, are manifestly antecedent to the earning of any profit. The rest—the construction of new works, the payment of interest and the repayment of principal—all pre-suppose that the profits have been earned, and that there is a clear fund which can be so applied. To my mind, it is exactly the same thing as if there had been a declaration that, after paying the current expenses and all other necessary outgoings without which nothing could be earned, the clear surplus profits and gains of the undertaking should be applied in a certain manner. That is the substance of it. The mode of the application makes no difference whatever to the question of what is "profit" and what is "gain."

That appears to me to be the plain and simple view of the case; it is the same view as has been taken by the Court of Appeal, and therefore I move your Lordships that this appeal be dismissed with costs.

Lord Blackburn.—I am of the same opinion; and I think that when the manner in which the case is raised and the point in the case itself are understood, it is obvious that that point lies in a very short compass indeed.

The Mersey Docks and Harbour Board, who are the creature of an Act of Parliament, as we are told in paragraph 3 of the Joint Case, obtain a revenue from a variety of sources—I need not go through them all. The board are proprietors of docks, and in respect of those docks they receive a revenue from exactly the same sources from which any private dock company, say the St. Katharine's Dock Company in London, would receive them. They receive a revenue from dock tonnage,

from dock dues, from charges for loading and unloading, from quay rents, from payments made by shipowners for the appropriation of quay space to them, and from charges made for the use of cranes and machinery. All those, as I say, are exactly the things from which a private dock company would receive its revenue. Besides those, they have three items of revenue, namely, "town dues on goods imported into or exported from the port of Liverpool," "anchorage dues on vessels anchoring in the Mersey," "harbour rates paid by vessels entering or leaving the Mersey, but not using the appellants' docks." Those items are of a different nature. I believe they have been modified and altered and extended by an Act of Parliament, but in their nature they were ancient harbour dues such as any one who refers to *Hargrave's Tracts*, where there is a great deal about them, will find were enjoyed by a private person in Tynemouth harbour under an ancient grant. These dues in the case of the Mersey were granted by King Charles II. to the ancestor of the Earl of Sefton, and by the Earl of Sefton sold to the Corporation of Liverpool, and from the Corporation of Liverpool they have been transferred to the Mersey Docks and Harbour Board. It is enough to say of them that they are property arising from petty customs and harbour dues, which might belong to a private person, but, as the Case states in fact, do belong to the Mersey Docks and Harbour Board. Besides that, the board derive a revenue from the rental of various properties.

Now when we see how the question arose between the parties, we find what is the real point in the case. The Mersey Docks and Harbour Board returned their assessment for the income tax as they ought to do, and they stated the amount upon which they considered themselves assessable thus: "the amount due and payable by them for interest on the debt during the year of assessment being the sum of 532,252*l.*" The Surveyor of Taxes surcharged them, and by such surcharge the sum was increased to the amount of "697,964*l.*, as the profits for the year preceding of the concern under the management of the appellants." On appeal to the Commissioners of Income Tax, the contention was "that their liability to income tax (if any) did not extend beyond the sum which was paid as interest upon the debt, and ought not to extend to the said sum of 100,000*l.* carried from the revenue to the sinking fund account, or to the surplus carried forward to the next year's account." On the other hand, it was contended on behalf of the respondent that under the provisions of the Income Tax Acts the appellants were liable to assessment to income tax in respect of the profits arising or accruing to them from the concern under their management, and not in respect of interest due or payable by them; and that for the purpose of ascertaining the amount for such assessment the total amount of their receipts should be taken, from which there should be deducted the cost of working, maintaining and repairing the sources of revenue, but not the interest payable upon the debt, nor the said sum of 100,000*l.* The commissioners concurred in the view put forward on behalf of the respondent, and, having satisfied themselves that allowance had been made in respect of rents for warehouses, &c. (that is, their real property), "already charged under No. 1 of schedule A, confirmed the surcharge in the sum of 697,964*l.*" So that there never was any real dispute at all that Her Majesty, whether she got it in one way or got it in another, was to have income tax upon the 532,252*l.*, which goes in payment of the interest on the debt; but the contest was, and is, whether under the peculiar local Acts of this Mersey Board there was anything to say that they were not to pay income tax on the residue, which, after deducting all the expenses of earning it, and after taking away all that was chargeable under schedule A., has, in fact, been found to be 165,712*l.* The real question in dispute is, whether income tax is payable upon that sum.

The first ground upon which the case of the appellants was put was that, by the terms of the local and personal Acts of the Mersey Docks and Harbour Board, it was enacted that they were to pay this sum in reducing debt (I am putting it roughly), and nothing else whatever, and that that meant that they were not to pay income tax upon

it. That seems to have been the opinion to which Mr. Justice Grove and Mr. Justice Lindley came in the Divisional Court, and they decided upon that ground. Their attention was not called either to the arguments which were used in, nor to the authority of, the cases of *Cameron* v. *The Mersey Docks and Harbour Board* and *Jones* v. *The Mersey Docks and Harbour Board* (1), where, upon these very same Acts, and with regard to this very same body, it was decided that this very same provision did not amount to an enactment forbidding them to pay poor rate. But as soon as it was made clear to the Court of Appeal that that had been the decision, they said, "That point will not do at all"; and there was a further reason which was given—namely, even if it had been said that they were not to pay poor rate, the income tax stood in a much better situation. For all those reasons, in fact, that ground has been substantially abandoned in the argument at your Lordships' bar, and, after what the noble and learned Lord on the Woolsack has said, I will say no more about it.

Then comes the second point which was argued, and which was in effect this: After the Mersey Docks and Harbour Board have done all that would have been done by the St. Katharine's Dock Company, or any other private dock company who own docks, in order to receive their income—after they have done all that would have been done by Lord Sefton, if his ancestor had not, unfortutunately for him, sold the town dues and the Mersey anchorage dues at a time when they were of much less value — after having done all this, the Act of Parliament says, You must apply the surplus to reducing debt; and when the debt is paid you must diminish your dock rates; and, of course, when you have paid off your debt your rates will be reduced (if you or your successors do your duty) by the amount of 500,000*l.* odd, and then there will be in future less revenue raised, and, of course, less income upon which to pay income tax. And the argument which is endeavoured to be urged is this, that inasmuch as they are ordered to apply to that purpose the sum which remains after all those expenses have been deducted, therefore the Queen is not to have income tax upon it. With reference to that I have endeavoured in vain to grapple with what the counsel for the appellants were saying, in order to bring it to a definite point. There is no ground whatever for saying that I can see—there is nothing in the nature of things, there is nothing in the words of the Act, to say that, when an income has been actually earned, when an actual profit upon which the tax is put has been earned and received by any person or corporation, Her Majesty's right to be paid the tax out of it in the least degree depends upon what they are to do with it afterwards—unless there is an express enactment, which, I think, there is in some cases, that they are to apply it to charities and other purposes. If the amount thus received is to be applied at their pleasure they must pay the tax. If it is to be paid over to shareholders or to creditors or to anybody else, the Queen is still to have her tax. Although it is expressly said that she is to be paid "before" they pay it over to any such person, it does not mean that she is not to be paid unless they are going to pay it over to any such person. It is impossible to construe it in that way. Whether it is to be applied in one way or the other, the Queen is to have her tax upon it.

The question therefore is, solely, whether or no the sources which produce this revenue are among those things which are enumerated (I care not whether in schedule A or schedule D) as those upon which the tax has been granted to Her Majesty.

It appears, as I have already pointed out, that in this particular case every one of these things is a thing in which a private person might have property, and from which a private person might receive revenue just as the Mersey Board does; and, if so, a private person would certainly be taxable upon it, and I see no reason whatever why the Mersey Board should not be taxable.

I have looked at the case of the *Glasgow Corporation Water Commissioners* v. *The Solicitor of Inland Revenue* (3). I have not looked at the Acts relating to the Glasgow waterworks, or the Acts under

(3) 2 Court Sess. Cas. (4th ser.), 708.

which that particular point was raised, and I am not competent to form an opinion upon them; but, knowing perfectly the general very great care and accuracy of the Lord President, I have no doubt that he construed those Acts rightly in construing them as he did. He decided upon a different principle, and in that I am inclined to think he was right. There the appellants relied very much upon some *dicta* (they were only *dicta*) in *The Attorney-General* v. *Black* (4), where the question was this: The corporation of Brighton had become entitled to a considerable income raised from duties on coals imported into Brighton, and that income they were obliged to bestow upon their corporate purposes and bring into their borough funds. It was held there that they were liable to pay income tax upon that, as being an income derived from coal duties. But in the course of the discussion it was said, amongst others, I see, by myself, in the Exchequer Chamber, that this was because it was an income or profit or revenue within the meaning of the Income Tax Act, and that it did not apply in such cases as that of a poor rate, where the overseers levy a large rate; or of a highway rate, where the surveyors of the highway levy a rate for the purposes of the highway; or in the case of a municipal corporation, who levy a borough rate for the purpose of spending the money upon borough objects. It was said that these were not in the nature of "profits" or income at all, and that they would not be taxable. It was a mere *dictum*; but the Lord President thought that it was right; and, with reference to the Glasgow case, he said, construing the Glasgow Acts and looking at their provisions, "This is not an income at all; it is not a profit at all; it is not a revenue of the sort which is mentioned. In this particular case," said he, and the other Judges, too, "it is merely a rate upon the inhabitants of Glasgow which is appropriated for the purpose of doing various things, and is not in the nature of a profit or gain at all. Now, as I said before, I have not looked at the Glasgow Acts, and I have no materials before me with reference to that case, and therefore I express no opinion as to whether that was a right construction of the effect of the Glasgow Acts or not; but, if it were, the principle on which the Court of Session there acted was one with which I am not at all prepared to quarrel. It is not necessary to say whether that decision was right or wrong; but it is certainly in conformity with the *dictum* which, as I said before, I seem myself to have expressed some years previously; and, whether it was right or wrong, it does not apply to the present case.

Now that was the only authority cited or referred to at all in support of the argument for the appellants, and it does not seem to me to be applicable. The consequence is that I quite concur with what has been proposed—namely, that, without hearing the counsel for the respondent, your Lordships should dismiss this appeal with costs.

LORD FITZGERALD.—I entirely concur in the judgment which has been announced, and I desire to add a few words.

The principal question for your Lordships' decision seems to me to be, whether the sum of 697,964*l.*, being the amount of the net receipts of the appellants for one year, and arising out of their corporate estates, constituted "profits received therefrom' within the meaning of No. 3, schedule A, of the Income Tax Act of 1842. The statute, it will be observed, does not speak of "profit" received by any particular person or body for their own benefit or that of any other person or body, or of its purpose or object or application, but simply of "profits received therefrom," and seems to use "profit" in the sense of income acquired from the estate, of whatever character it may be, over and above the costs and expenses of receipt and collection.

It is not unimportant in the particular case before us to look to the constituent parts of the corporate estate of the appellants, which are thus stated:—"1. Dock tonnage rate on ships entering into or leaving the docks. 2. Dock dues on goods imported into or exported from the port of Liverpool and brought into the docks, or landed at, or deposited upon, or carried over any of the appellants' quays, piers, landing stages or land. 3. Town dues on goods imported into or exported

(4) 40 Law J. Rep. Exch. 194; Law Rep. 6 Exch. 308.

rom the port of Liverpool. 4. Anchorage dues on vessels anchoring in the Mersey. 5. Harbour rates paid by vessels entering or leaving the Mersey, but not using the appellants' docks. 6. Charges for unloading and housing in and delivery from the appellants' warehouses goods from vessels. 7. Quay rents levied in respect of goods not removed by the owners from the quay within the prescribed time, and rents for quay space occupied by owners of goods by permission of the board. 8. Rental of various properties belonging to the board, and occupied for the storage of timber, as shipbuilding yards, stores, coal yards, &c. 9. Payments made by shipowners for the special appropriation to their use of quay space. 10. Charges made for the use of cranes and machinery, and tolls levied for the use of the appellants' dock railways." And it is to be observed that the income embraces, in addition to rates on ships using the docks on the river Mersey, and dues on goods imported or exported, also warehouse and quay rents, charges for use of machinery, railway tolls, and rentals of various properties enumerated in No. 8. A portion of this property the appellants derive from the old corporation of Liverpool; and I apprehend it would not be contested that so much of the income would have been liable in the hands of the old corporation, had it remained in their hands—see *The Attorney-General* v. *Black* (4). There is nothing to be found in this income in the nature of a district or local rate, or of a rate or tax which could be considered as a payment by which the inhabitants of the locality procure for themselves some local benefit. The dues are, in effect, levied on the whole world coming to the Mersey or to Liverpool, and on those taking advantage of the docks or other property of the appellants. In this respect the case is so distinguishable in its facts from the Glasgow case that it seems to me unnecessary to consider the authority of that case.

On this question I adopt the language of Sir George Jessel in the Court below: "I have so clear an opinion that I can entertain no doubt whatever"; and of Mr. Justice Blackburn in *The Attorney-General* v. *Black* (4). The remaining questions in the case have been satisfactorily disposed of in the Court of Appeal, in accordance with the opinion of the Judges as delivered in your Lordships' House in *The Mersey Docks* v. *Cameron* (1), and with the principles laid down in that case.

I entirely concur in the decision now announced, and in the reasons expressed by the Lord Chancellor and by the noble and learned Lord opposite (Lord Blackburn) for that decision.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Gregory, Rowcliffes & Co., agents for A. T. Squarey, Liverpool, for appellants; W. H. Melvill, for respondent.

[IN THE COURT OF APPEAL.]

1883. Nov. 15. } MILNES *v.* THE MAYOR, ETC., OF HUDDERSFIELD.*

Water Company—Water rendered deleterious in Service-pipe—Property in Service-pipe—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 35 *and* 48—*Local Act*, 32 & 33 *Vict. c.* cx. *ss.* 66 *and* 71—*By-laws, effect of.*

The corporation of H. were empowered by a private Act, which incorporated the Waterworks Clauses Acts, 1847 *and* 1863, *to supply water for domestic purposes. Section* 35 *of the Act of* 1847 *provides that undertakers of waterworks shall provide and keep in the pipes to be laid down by them a supply of wholesome water. Section* 48 *provides that occupiers of dwelling-houses may, on making certain payments and getting certain consents, lay leaden or other pipes from the mains into their premises. The local Act enables the corporation to make by-laws for preventing waste, misuse or contamination of the water; and provides, in section* 71, *that the corporation shall not be bound to lay down service-pipes, but may do so by agreement with and at the expense of the occupier. One of the by-laws provides that*

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

the connecting pipes shall be deemed to belong to the corporation.

The plaintiff was injured by using water which had, though pure when in the mains, become contaminated from passing through the leaden service-pipe which had been laid down by the defendants at his request and expense.

In an action for damages for the injury so caused,—

Held, *that the defendants were not liable; that the leaden service-pipe was not their property, and that they had fulfilled their statutory duty by having pure and wholesome water in their mains.*

Appeal from the judgment of Mathew, J., on further consideration. The case is reported 52 Law J. Rep. Q.B. 64.

Action by the plaintiff, a resident at Huddersfield, against the Huddersfield corporation, to recover damages for injuries caused by unwholesome water alleged to have been supplied by them.

The defendants are empowered under the Huddersfield Waterworks Act, 1869 (32 & 33 Vict. c. cx.), which incorporates the chief provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17) and 1863 (26 & 27 Vict. c. 93), to supply water for domestic use within the limits and from the sources described in their private Act. The plaintiff had for some years been supplied from one of the defendants' mains through a lead service-pipe, part of which had been laid down by the defendants at the expense of the landlord of the plaintiff's house, and the rest at the plaintiff's expense. It was admitted that the water while in the main was pure and wholesome, and that it became contaminated with lead while passing through the service-pipe from the action of the water upon the lead of which the pipe was made. The damage caused to the plaintiff was not denied; the damages were assessed by the jury, and the liability of the defendants reserved for further consideration by the Judge. Mathew, J., gave judgment for the defendants.

The plaintiff appealed.

Wills, *Q.C.*, and *Waddy*, *Q.C.* (with them *C. Dodd*), for the appellant.—The action brought by the plaintiff is founded on the statutory obligation imposed on the defendants, as undertakers for the supply of water, under the Waterworks Clauses Acts, 1847 (1), under the local Act of 1869, and under the by-laws (2) made by them under their private Act.

(1) 10 & 11 Vict. c. 17. s. 35: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act who, as hereinafter provided, shall be entitled to demand a supply and shall be willing to pay water-rate for the same; and such supply shall be constantly laid on at such a pressure as will make water reach the top story of the highest houses within the said limits. . . . And the undertakers shall cause pipes to be laid down and water to be brought to every part of the town or district within the limits of the special Act whereunto they shall be required by so many owners or occupiers of houses in that part of the town or district. . . ."

Section 48: "Any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water-rate in respect of such premises, by this or the special Act directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises, to communicate with the pipes of the undertakers, such pipes to be of a strength and material to be approved of by the undertakers, or, in case of dispute, to be settled in England or Ireland by two Justices, and in Scotland by the sheriff, or in either case by the inspector, to be appointed as aforesaid: Provided always, that every such owner or occupier shall, before he begins to lay any such pipe, give to the undertakers fourteen days' notice of his intention to do so."

(2) 32 & 33 Vict. c. cx. section 66: "For preventing waste, misuse, undue consumption or contamination of the water of the corporation, the following provisions shall have effect—namely,—

1. The corporation may from time to time make such by-laws and regulations as they think necessary for the objects aforesaid, to be observed by persons supplied with water."

Section 71: "Notwithstanding anything in this Act or in any Act incorporated wholly or in part with this Act the corporation shall not be compelled to lay down service-pipes or other works from their mains into the houses adjoining or near thereto for the supply of such houses with water on terms of an annual rent for such

Milnes v. *Mayor of Huddersfield, App.*

The pipes are the property of the corporation until they pass within a private house, and the corporation are answerable for damage done by water rendered deleterious by such pipes. Even if the service-pipe is not the property of the corporation, still they are bound to furnish a supply of water which is pure and wholesome within the premises to which the water is supplied. Moreover, a corporation which supplies water is a trading company, and a trading company which sells water is bound at common law, and apart from any statute, to supply a wholesome article. There is a contract between them and the consumer, they receive payment for the water supplied, and there is nothing to prevent the common law duty to supply an article fit for use from attaching.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Forbes, Q.C.*, and *R. V. Williams*, for the defendants, were not called on.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of Mr. Justice Mathew was correct, and must be affirmed. The facts are admitted. The plaintiff has been injured by water which had become poisonous in consequence of its passage through a lead pipe. The origin of the mischief is clear, inasmuch as the only part of the system of pipes which is made of lead is the service-pipe which connects the plaintiff's house with the main pipes of the corporation. The plaintiff sues the corporation, as the persons who supply the water, for the damage thus caused; and it appears to me that in order to establish a foundation for his action he must shew, either that the corporation have been guilty of a breach of contract (if contract there be), or else that a statutory obligation is laid on them which they have failed to fulfil, as otherwise no action can be maintained by him. It is not disputed that the corporation collect the water in certain reservoirs; that it passes from those reservoirs along iron mains; and it is admitted that the water while in those mains is pure, good and wholesome. The pipe which leads from the mains into the plaintiff's house is made of lead, and it is in this pipe that the water becomes poisonous. It is necessary, therefore, to consider in whom is the property in, and the control of, this leaden pipe. If it were the property of the corporation, and if the defendant had no control over it, it might follow that the corporation would be liable. But, however that may be, I am of opinion that, on the true construction of the statute, that is not the case, and that the damage complained of has arisen from causes for which the corporation are not responsible. Turning first to 10 & 11 Vict. c. 17. s. 35 (1), we find it provided that "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water." That means that they shall keep pure and wholesome water in the pipes which it is their duty to lay down, and if they do keep such a supply of water in such pipes it seems to me that they have performed the duty imposed upon them by that section. It is said, however, that the lead pipes, which it appears are not seldom used to connect the main pipes with private houses, "are pipes to be laid down" by the corporation under section 35; but I am of

pipes or works being charged or paid; but they may do so by agreement, or may require the full costs of such service-pipes and works to be paid in the first instance."

The following by-laws were also referred to:—

2. "The term 'consumer's pipe' means any pipe, not being the property of the corporation, used or intended to be used for the conveyance or distribution of water for the time being supplied by the corporation."

5. "The service-pipe, brass ferule and works for taking the supply of water from the main pipe of the corporation into the house, building or premises intended to be supplied, and the stop-tap and works for controlling such supply, shall be provided and executed by the corporation, but at the expense in all respects of the applicant, except as to the stop-tap, which will be provided by and at the expense of the corporation. . . ."

6. "The connecting pipes and works from the street main to the consumer's premises shall at all times be under the control and management of the corporation, and shall be deemed to belong to them, and they shall have free access thereto at all times, and especially to work the stop-tap; and such connecting works with the street mains shall at all times be kept or put into repair at the expense of the owner or occupier of the premises, and shall not be removed or in any way interfered with by the consumer without the consent of the corporation first obtained; but the corporation shall have the right to disconnect, discontinue and remove the same when they deem it just and proper to do so."

opinion that this is not so. I do not dwell upon the provisions of section 44, because that applies to small tenements the annual value of which does not exceed 10*l.*, and this house does not belong to that class of tenements. I proceed, therefore, to consider section 48 (1), a section which, it is to be observed, belongs to a group of sections classed under the following general heading, "and with respect to the communication pipes to be laid by the inhabitants, be it enacted as follows"; and the section then proceeds, "any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water rate in respect of such premises by this or the special Act directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers, such pipes to be of a strength and material to be approved of by the undertakers." This section shews plainly that an inhabitant can, with the consent of the owner of any intervening ground, lay pipes through that land to his house. These pipes may be "leaden or other pipes," the choice of material to be used is with him; and although in this case there is no owner of intervening land for this purpose other than the defendants—for the corporation, the undertakers of waterworks, also act as the local board, so that for this purpose the street must be considered to be the property of the defendants—still, in construing this statute, we must treat this question as though that were not the case, as it is quite possible that the undertakers of the water supply might own the mains, while some different body, such as a distinct local board, might for this purpose be the owners of the street. This being so, it does not appear to me that section 19 of 26 & 27 Vict. c. 93—which provides that for protection of the water, "it shall not be lawful for the owner or occupier of any premises supplied with water by the undertakers, or any consumer of the water of the undertakers, or any other person, to affix, or cause or permit to be affixed, any pipe or apparatus to a pipe belonging to the undertakers or to a communication or service-pipe belonging to or used by such owner, occupier, consumer or other person, . . . without the consent in every such case of the undertakers"—affects this case; for it only enacts that to prevent waste or misuse no one shall affix any pipe to a pipe belonging to the undertakers or to a service-pipe used by any person, or make any alteration, without the consent of the undertakers.

That being the law on the general statutes, we have now to consider the private Act of July, 1869. That Act (32 & 33 Vict. c. cx.) provides, in section 66, that the corporation may make by-laws and regulations "for preventing waste, misuse, undue consumption or contamination of the water;" and section 71 enacts that "the corporation shall not be bound to lay down service-pipes or other works from their mains into the houses adjoining or near thereto for the supply of such houses with water on terms of an annual rent for such pipes and works being charged and paid, but they may do so by agreement, or may require the full cost of such service-pipe and works to be paid in the first instance." This shews that the corporation may, by agreement with an owner or occupier of a house, lay down service-pipes. Here they have done so, and whether or not they were paid before the work was done matters not, the fact remains that they laid down pipes under an agreement with the plaintiff and at the plaintiff's request and expense. Therefore, although the corporation were in a sense engineers, still the pipes were the pipes of the plaintiff, and it is clear that it was at his request and desire that these pipes were laid down.

I do not think it is necessary to enter on the question of conflicting by-laws, or as to whether two inconsistent by-laws can be contemporaneously in force. I dismiss the earlier by-laws, and turn to those which are now in force and applicable to this case. The 5th by-law provides that the service-pipe and all the works forming part of it, except the stop-tap, are

to be provided at the cost of the applicant. And the 6th by-law says, "The connecting pipes and works from the street main to the consumer's premises shall at all times be under the control and management of the corporation, and shall be deemed to belong to them." It is therefore important to consider what those words "deemed to belong" mean, as but for them the pipes in question would be the property of the plaintiff; but it is said that the effect of the by-law is to make such pipes the property of the defendants. I do not think that is so; the words relied on do not say that the pipes are for all purposes to be deemed to belong to the corporation, but only for the purposes of the by-law. These by-laws profess to be made in pursuance of the private Act of 1869; and section 66, to which I have already referred, sets out the object for which they were to be made, that is, for the prevention of waste, &c. The by-laws do not attempt to go beyond the legitimate powers conferred by section 66 of the Act, and the words "deemed to belong" shew that the defendants do not claim any property in these pipes, but only such control as it is important should be in the hands of the corporation for the protection of the water. Further, there are in these by-laws, which do not alter the property in the pipes, other expressions, which shew that, by agreement, pipes other than leaden may be laid down. One of them states that "Every consumer's pipe not being of cast iron, and not being otherwise authorised by these regulations or permitted by the corporation, shall be of lead," and that shews that a pipe not of lead was contemplated. It is also to be observed that consumers' pipes are defined in the by-laws to be pipes not the property of the corporation. So that it seems to be clear that, as the corporation could only lay down connecting pipes by agreement with the plaintiff, and that as the pipe so laid down could be made of iron if the plaintiff so desired, in which case no harm would have resulted, the plaintiff has got that for which he bargained, the corporation have discharged the duty imposed by the statute; and if there was a contract, which I think there was not, the corporation have performed all that they were bound to do under that contract. It has been urged that there was a contract between the plaintiff and the corporation that the corporation would supply water which should be pure and wholesome when in the premises of the plaintiff; but I am of opinion that to hold that would be to change the terms of the statute, and to impose upon the corporation a duty not imposed by the statute; and therefore I do not think that the argument can prevail.

BRETT, M.R.—I am of the same opinion, and for the same reasons.

BOWEN, L.J.—I concur.

Judgment affirmed.

Solicitors—Fitch, agents for Sykes & Son, Huddersfield; Van Sandau & Co., agents for Batley, Huddersfield.

[IN THE COURT OF APPEAL.]

1883. Nov. 19. } *In re* DUDLEY; *ex parte* MONET.*

Solicitor—Attachment—Non-compliance with Order for Payment of Money—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4. *sub-s.* 4.

Where an order on a solicitor for payment of a sum of money is intended to be a punitive order for the purpose of punishing the solicitor for misconduct, the Court will order an attachment to issue against him for non-compliance therewith.

Appeal by Sarah Monet from a decision of the Divisional Court reversing an order of Huddleston, B., that a writ for an attachment should issue against Crews Dudley, a solicitor of the Supreme Court.

In December, 1880, a sum of 339*l.* was paid out of Court to C. Dudley, who was acting as solicitor for the beneficiaries, of whom S. Monet was one, under a will.

In May, 1881, Dudley, after some correspondence, sent a draft for 100*l.* to a

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

person named Rees, who was acting on behalf of S. Monet.

In March, 1882, a rule was obtained on behalf of S. Mouet from a Divisional Court calling upon Dudley, as an officer of the Court, to pay the balance into Court; and, upon the argument of the rule, the Court referred all the matters to a Master to report upon. It appeared from the report that Dudley had paid the money in question into his own account at his bankers, and had dealt with it as his own. The Court thereupon ordered him to pay the balance due and the costs of the application.

A portion only of the money having been paid, a summons to attach the solicitor was taken out, and an extension of time for payment by instalments was granted to him.

No further payments having been made, Huddleston, B., made an order that a writ for an attachment should issue against the solicitor.

The Divisional Court (Grove, J., and Manisty, J.) discharged this order, being of opinion that the order for payment originally made by the Court was merely a civil process, and that the solicitor, inasmuch as it had been proved that he had no means, ought to be treated merely as an ordinary debtor under the provisions of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

S. Monet appealed.

Fraser Macleod, for the appellant.—The order made for the payment of the money was made against the respondent in his character of officer of the Court making the order, within the meaning of the Debtors Act, 1869, s. 4. sub-s. 4. The order was a disciplinary or punitive order, and Huddleston, B., therefore, had jurisdiction to make an order for attachment to issue, the solicitor having disobeyed the order for payment. The principle laid down in the case of *In re Freston* (1), which was not brought before the Divisional Court, as to the jurisdiction of the Court over solicitors in their character of officers of the Court, is applicable to the present case. The default by the solicitor in not obeying the order for payment is a default within the exception in sub-section 4, for which he is liable to be arrested. *Marris* v. *Ingram* (2) was also cited.

C. F. Mundy, for the respondent.—This case is distinguishable from that of *In re Freston* (1), for the order for payment was made against the solicitor, not in his character as officer of the Court, but merely as a debtor. Moreover, the proceedings have been taken in a wrong form. No affidavit has been filed alleging that the solicitor was guilty of fraud, and no order has been made calling upon him to answer matters in an affidavit. The only question before the Court below was whether proper proceedings had been taken. The case of *In re Ball* (3) is in point; there the Court refused to order an attachment upon a common affidavit, even though the solicitor had disobeyed an order to pay a sum of money received by him in his character as solicitor.

Macleod did not reply.

BRETT, M.R.—I regret that I am unable to agree with the decision of the Divisional Court. The case of *In re Freston* (1), in which this matter and the rules, which ought to serve as a guide, were discussed in the Court of Appeal, was not brought before the Divisional Court. I adhere to the principles laid down in that case, where it was pointed out that the position of solicitors was a peculiar one. When solicitors have money paid to them, the Court may make several kinds of orders. The Court may think that a solicitor to whom money is paid is bound to pay it over merely as if it were a debt. If an order is made upon a solicitor in that character or upon that ground the order is merely one for the collection of the money as a debt, and the Court may treat the solicitor merely as a debtor. If so, the solicitor would come within the section, and no order could be made for his arrest.

(1) 52 Law J. Rep. Q.B. 545; Law Rep. 11 Q.B. D. 545, 554.

(2) 49 Law J. Rep. Chanc. 123; Law Rep. 13 Ch. D. 338.

(3) 42 Law J. Rep. C.P. 104; Law Rep. 8 C.P. 104.

In re Dudley; ex parte Monet, App.

But the Court have another jurisdiction over solicitors; for if they think that a solicitor, as such, has been improperly dealing with moneys belonging to his client, or acts improperly otherwise, they have jurisdiction to enquire into his conduct in order to preserve the good conduct of solicitors as officers of the Court. If the Court thought that the solicitor had failed to pay the money by accident or misfortune, or under a misapprehension, or was merely keeping the money out of obstinacy, they would not make a punitive order against him. But if they thought that he had misbehaved himself, or had acted dishonestly, it would be otherwise, and an order for his arrest would be made: for solicitors are more strictly bound to act honestly towards their clients than other persons. It was said that, in the case of *In re Ball* (3), there was a suggestion by Chief Justice Cockburn to the effect that the proper and more strict mode of enquiring into the alleged misconduct of a solicitor is by motion calling upon the solicitor to answer matters in an affidavit. That is true; but I do not think that that was intended to be an exhaustive declaration of the only manner in which such an enquiry could be made by the Court. The question here is whether the order for payment, upon which the attachment was to issue, was intended to be a punitive order for the purpose of punishing the solicitor for misconduct. The money in question had been paid to the solicitor, as solicitor, for the purpose of being handed over to his client; but it was paid into his own account, and he dealt with it as his own. That would be inexcusable, unless it could be said that he had an obstinate idea that he had a right to do so. That was the allegation before the Divisional Court; but they did not treat the case simply as an ordinary application for the payment of money. The order was not made without any enquiry, for the matter was sent to a Master to make a report; and that is the course which the Court invariably took when a solicitor was called upon to answer matters in an affidavit. It is obvious that the Court sent this matter to the Master for a report to be made upon the conduct of the solicitor in his character as an officer of the Court, and to see whether or not a punitive order should be made.

The Court, having all the matters and the parties before them, turned the application which was in one form into another, and treated it as if it were an application for the solicitor to answer for his conduct. The solicitor appeared before the Master, and, upon the report, the Court made an order for payment of the money. That was an order which the solicitor was bound to obey. Although the solicitor had received some indulgence as regards the payment of the money by instalments, yet the arrangement would be no answer to the application for an attachment, for it had not been complied with. I am of opinion that the order which was disobeyed was a disciplinary and punitive order. When the case came before Baron Huddleston for an order to attach the solicitor, the learned Judge, in the exercise of his discretion, made the order.

The Divisional Court did not set aside that order upon the ground that the learned Judge had not rightly exercised his discretion, for that was not questioned, but upon the ground that he had no jurisdiction to make it. I am unable to agree with that decision, and the order of Baron Huddleston must therefore be upheld.

BAGGALLAY, L.J.—I am of the same opinion. I cannot but think that, if the case of *In re Freston* (1) had been brought before the Divisional Court, they would have arrived at a different conclusion. I agree with the principles laid down by the Master of the Rolls in that case, and I can come to no other conclusion than that the order made in this case was intended to be a punitive or disciplinary order within the principle there laid down. The solicitor has been guilty of conduct which it was the duty of the Court to deal with by means of an order of a disciplinary character. In my opinion the order was, under the circumstances, rightly made.

BOWEN, L.J.—In this case the Divisional Court decided upon a point of law, and not because they considered the Judge had wrongly exercised his discretion. I think the truth is that the case of *In re Freston* (1) was not before them. It seems to me

that that decision did not lay down any new view of the law. The Debtors Act, 1869, by section 4, sub-section 4, took out of the indulgent operation of the Act a default by a solicitor "in payment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order." In such a case the solicitor is left to the operation of the old law, by which, however, he could not be sent to prison in every case, but only if the Court thought the circumstances of the case such as to render it necessary to put in force the punitive or disciplinary powers with which they were entrusted over solicitors. In the case of *In re Ball* (3) the Court refused to order an attachment, because nothing further appeared than that there had been an order to pay over a sum of money. A person applying for a summary remedy against an officer of the Court may be applying only for a civil remedy; and I think the language of Chief Justice Cockburn comes to that, and nothing more. It does not follow from that case that the default of an officer of the Court, who is ordered to pay money in his character as such, is within the statute, because the terms of the section are explicit. Such a contingency is not within it; nor did the Court think so, but only treated the matter as one which was not to be assumed to be clear against the solicitor. But in this case an order was made against the solicitor as an officer of the Court who has been guilty of misconduct. A rule was applied for and granted, calling upon him to shew cause why he should not pay money as an officer of the Court, and the very terms of sub-section 4 are directed to an enquiry which seems to me to be the same in effect and substance as if the application had been made for the solicitor to answer matters in an affidavit; and the Court referred it to a Master, and having heard the whole matter, with the report before them, they ordered the money to be paid. One cannot read the report without coming to the conclusion that there was very gross and culpable misconduct, and that an order made on that report must have been based upon a view taken by the Court that the solicitor had been guilty of misconduct. I am, therefore, of opinion that the solicitor cannot claim the benefit of the Debtors Act, 1869, and that the view taken by the Divisional Court cannot be upheld.

Appeal allowed.

Solicitors—Marsland, Hewitt & Everett, for appellant; G. D. Dudley, for respondent.

[IN THE COURT OF APPEAL.]

1883. Nov. 19.

HALL *v.* BRAND.*

Practice — Witness — Subpœna out of Jurisdiction—Reference of Action and all Matters in Difference between the Parties—Trial — Action depending in Superior Court—17 & 18 *Vict. c.* 34. *s.* 1.

Where an action and "all matters in difference" between the parties are by consent referred to a referee, the Court has no jurisdiction under 17 & 18 *Vict. c.* 34 *to compel a person, resident out of the jurisdiction, to attend as a witness before the referee. The hearing of the reference is not a trial of an action depending in a Superior Court within the meaning of the statute.*

Action to recover the hire of a dredger.

By consent of the parties an order was made referring the action "and all matters in difference between the parties" to a special referee, who had power to enter judgment in the action according to the award that should be made.

The defendant applied at chambers by summons for an order for leave, pursuant to 17 & 18 Vict. c. 34. s. 1, to issue a subpœna to enforce the attendance before the referee of certain witnesses who resided in Scotland. The Master refused to make the order.

The Divisional Court (Grove, J., and Mathew, J.) affirmed the decision of the Master at chambers.

The defendant appealed.

Maurice Powell, for the defendant.—The proceedings before the referee consti-

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

tute a trial within the meaning of 17 & 18 Vict. c. 34. s. 1, and also of the Judicature Acts and rules of Court. The words of section 1 are—"any action or suit now or at any time hereafter depending" in any of Her Majesty's Superior Courts; and then authority is given to compel the personal attendance at the trial of any witness who may not be within the jurisdiction of the Court. The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 1, first authorised, by consent of the parties, the trial of questions of fact by a Judge without a jury; and if the provisions of 17 & 18 Vict. c. 34 do not apply to Order XXXVI. rules 7, 48 and 49, as to the modes of trial, they would not apply to a trial of questions of fact by a Judge without a jury under the Common Law Procedure Act, 1854. Consequently, 17 & 18 Vict. c. 34 could only apply to a case where there is a trial by a Judge and jury, for that was the only mode of trial known at the date of the passing of the statute. But if the Court has jurisdiction to make an order as to the mode of trial, that is an order within the action; the referee would be bound to try the case in the manner provided by Order XXXVI., and that trial would be the trial of an action depending in the Superior Court within the meaning of 17 & 18 Vict. c. 34. If the proceedings are the trial of an action, then the Court has jurisdiction to make an order granting leave to the defendant to issue the subpœna—*Harris* v. *Barber* (1). No doubt, an application under the section was refused in *O'Flanagan* v. *Geoghegan* (2); but that was the case of a compulsory reference, and it does not appear that there was any action.

He also referred to *Allen* v. *The Duke of Hamilton* (3), *Pontifex* v. *Severn* (4) and the Judicature Act, 1873, s. 56.

BRETT, M.R.—In this case the Divisional Court were of opinion that the case was not within the statute 17 & 18 Vict. c. 34. s. 1, and that they had no jurisdiction to make the order in question.

(1) 25 Law J. Rep. Q.B. 98.
(2) 16 Com. B. Rep. N.S. 636.
(3) Law Rep. 2 C.P. 630.
(4) 47 Law J. Rep. C.P. 211; Law Rep. 3 C.P. D. 146.

It was urged on behalf of the defendant that there was a cause, and that by Order XXXVI. rule 7, an order might be made as to the mode of trial—that is, that there might be an order that the cause should be tried by a Judge with or without a jury, or by a Judge sitting with assessors, or by an official or special referee. It was suggested that that being an order as to the mode of trial which the Court had jurisdiction to make, it was an order made in the action and one for the trial of the action, and that therefore, when the case came before the referee, he had to try it in the manner provided by Order XXXVI. rule 7; and that the hearing, therefore, was a trial of a cause still depending in a Court within the meaning of the statute. It seems to me that it is not.

The case before us is one in which an order for the reference of the cause and "all matters in difference between the parties"—that is, of matters which are not within the cause—could only be made by consent. It was not doubted that that was an order which the Court could make, and that it could have been made, with the consent of the parties, long before the passing of Order XXXVI. rule 7. The question is whether, where such an order has been made, it can be said that the hearing before the referee is a trial of the cause, upon the mere ground that by consent of the parties it was agreed that judgment might be entered upon the award. It is impossible to say that that is the trial of the cause within the meaning of 17 & 18 Vict. c. 34. I doubt whether the fact of the reference being agreed to and of the order being made does not put an end to an action depending in the Court within the meaning of the statute. I decide the present case upon this ground—that where a referee has been selected by the parties by consent to try the cause and all matters in difference which are no part of the cause, the hearing before the referee cannot be said to be a trial of the cause within the meaning of the statute. One of the difficulties pointed out by Lord Justice Baggallay, in holding the contrary, was that, if the witness were called, it might happen that he would be examined solely as to the matters in difference which

are not within the cause, and not at all in respect of matters within the cause. It was said that that might be met by an order that the witness should be examined upon the subject-matters in the cause only. But that would be dealing with a witness in a manner which is not allowed in any Court in any circumstances. There is no law which prevents a party from examining a witness as to all matters material in a dispute which is before the Court; a witness cannot be examined as to parts of a cause only. I am therefore of opinion that the hearing of the cause before an arbitrator, upon such an order as the present one, is not a trial of the cause within the meaning of the statute, and that there should be no order for a subpœna.

BAGGALLAY, L.J.—I am of the same opinion. I base my judgment on this ground alone: that where not only the matters in an action, but all matters in difference between the parties, are referred, the trial before the referee is not a trial of an action depending in the Superior Court within the meaning of the statute.

BOWEN, L.J.—I am of the same opinion, and I base my judgment upon the same ground. The object of the section is to enable a Court to issue process to enforce the attendance at a trial of witnesses who are out of the jurisdiction. Although I do not think that if the mode of trial is afterwards altered by legislation that section may not comprehend the substituted mode of trial, still I think it must be a mode of trial, so far as this section is concerned. Here there was an action, and a summons was taken out under the old procedure in vogue before the Common Law Procedure Act to refer the action and all matters in difference between the parties to arbitration. It cannot be said that, where a referee has power to decide questions which arise outside the action, the hearing is a trial within the meaning of the section. The mere fact that all matters in difference have to be decided by the arbitrator at the same time, and together with the decision which is to be given in the action, is sufficient to shew that the statute cannot be so used. It was suggested that Order XXXVI. rule 7, applies, because the Court has power to order a cause, and not merely issues in a cause, to be referred. That rule affords no assistance, for two reasons: first, because this is not a mere reference of a cause, but of all matters in difference—and a person cannot be compelled to attend before an arbitrator by a mere rule of Court if the only legislation upon the question is directed to a trial other than an arbitration; and, secondly, because it is very doubtful whether, even in the case of an action which is referred *in toto* under the new rules to a referee, the statute 17 & 18 Vict. c. 34 would apply, upon the ground that the withdrawal of the action from trial and the sending of it to a referee is not an order with regard to the trial within the meaning of Order XXXVI. rule 7.

Application refused.

Solicitors—Blount, Lynch & Petre, for defendant.

1883. Nov. 23. HOWITT *v.* THE NOTTINGHAM AND DISTRICT TRAMWAYS COMPANY (LIMITED).

Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29 *and* 55—*Liability for Non-repair of Road and Tram-line—Contract with Road Authority—Negligence.*

Where, in pursuance of the powers given by section 29 *of the Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *a tramway company had contracted with the road authority for the maintenance by the latter of the road and lines for a fixed annual payment,*—Held, *that the effect of such contract was to transfer to the road authority the liability which would otherwise have been cast upon the company for damage occasioned by the road being out of repair.*

Action in the County Court of Nottingham claiming damages for injury to the plaintiff's carriage by the tram-line of the defendants and the adjoining portion of the street not being maintained and kept in good and proper condition and repair. It was proved that the stone

paving in which the iron tram-line was set had become out of repair, and that the accident was occasioned thereby; that the corporation of Nottingham were the road authority, and that a contract had been entered into between the defendants and the corporation for the maintenance and repair by the latter of the road and tram-line, under section 29 of the Tramways Act, 1870 (1). The County Court Judge upon this nonsuited the plaintiff; but a rule was obtained to set aside the nonsuit, which now came on for argument.

By the contract entered into between the defendants and the corporation as road authority, the latter undertook, for an annual sum, to maintain and repair the roads upon which the tramways were laid to the extent mentioned in section 29 of the general Act, their engineer being the sole judge of the necessity and reasonableness of the works executed in pursuance of the clause.

A. Wills, Q.C. (*Weightman* with him), shewed cause.—The primary liability to repair was undoubtedly cast upon the company, but the doing of such repairs was put under the control of the road authority. Then the same Act provides that the road authority may itself contract to do these repairs. If such contract is made, the liability to repair and the liability for the neglect to repair is transferred under the statute to the road authority. The object is to get rid of divided jurisdictions and divided liability in respect of the same road. It is true that no one who has a duty cast upon him can discharge himself by the employment of some one else to do it if his contractor is guilty of negligence in cases within the rule in *Bower* v. *Peate* (2), but where an Act of Parliament transfers the duty it must surely also transfer the liability.

R. T. Wright, in support of the rule.—This being a liability to the public imposed expressly in the first instance by Act of Parliament cannot be got rid of by the defendants as against the public by the employment (for it is nothing else) of a contractor to do their work; and it does not affect the question of liability for injury occasioned by the negligent doing of this work that the Act of Parliament has enabled the defendants to transfer the obligation to repair to the road authority as contractors. In *Angus* v. *Dalton* (3) Lord Blackburn says, "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

[LORD COLERIDGE, C.J.—There is an express power here given to the defendants to contract with a particular person.]

It is an optional power; the public would not know of the arrangement having been made. This is to be decided

(1) By section 28 of 33 & 34 Vict. c. 78, the Tramways Act, 1870, it is enacted that "the promoters shall, at their own expense, at all times maintain and keep in good condition and repair with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway, ... and so much of the road as extends 18 inches beyond the rails of and on each side of any such tramway."

Section 29 enacts: "The road authority on the one hand and the promoters on the other hand may from time to time enter into and carry into effect, and from time to time alter, renew or vary contracts, agreements or arrangements with respect to the paving and keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway, and the proportion to be paid by either of them of the expense of such paving and keeping in repair."

Section 55 enacts: "The promoters . . . . shall be answerable for all accidents, damages and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies or bodies collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages and injuries."

The private Act, 40 & 41 Vict. c. cxxiv., under which the defendants' tramways were made, was also referred to in argument, but as the Court expressed their opinion that it did not affect the question of the construction of the general Act it is unnecessary to cite the sections in detail.

(2) 45 Law J. Rep. Q.B. 446; Law Rep. 1 Q.B. D. 321.

(3) 50 Law J. Rep. Q.B. at p. 750; Law Rep. 6 App. Cas. at p. 829.

on the principle of *Hole* v. *The Sittingbourne Railway Company* (4) and *Gray* v. *Pullen* (5). Section 55, saying that the promoters shall save harmless the road authorities, is wholly inconsistent with the contention of the defendants that they cannot be sued by reason of having entered into this contract with the corporation.

He relied also on section 9 of the private Act.

LORD COLERIDGE, C.J.—I must say that although I am unwilling as a rule to find fault with Acts of Parliament I could have wished that this had been a little clearer in expression. On the best conclusion, however, that I can form I think that the corporation is liable in this action, and, as the County Court Judge has so decided, I think that he was right, and the nonsuit must be upheld and this rule discharged. The matter depends on the true construction of the sections in the general Act, and there is no doubt that in the first instance, both under the general and under the special Acts, the liability for the repair and maintenance of the roads upon which the tramway runs is cast on the promoters and the defendant company, who are their successors. But in both the Acts it is equally clear that the corporation are from the very first also so far interested in these roads as that they exercise control over them, and can require such materials to be used as they direct, and it is provided in section 28 that if the duty of the promoters in this respect is not fulfilled, the corporation may interfere and do the work themselves. Then I think that section 29 must be read with section 28 as part of the whole enactment with which we have to deal. Now it says that the road authority and the promoters may enter into contracts with respect to keeping in repair the whole or any portion of the roadway of any road on which the promoters shall lay any tramway. That, then, is a Parliamentary power for the corporation to contract with the promoters to take on themselves the liability which was primarily on the promoters. Here they have so contracted; and what follows? Why the transfer of the liability which the law imposes on every one who has a public duty to perform. If any one is injured by the neglect of duty on the part of any person or corporation, he shall have a right of action against such person or corporation—that is the general rule of law, and I think that it applies here.

Is it altered at all by section 55? That section is not, as it seems to me, happily expressed, but I think it does not alter the application of the rule of law. It lays down that the promoters shall be answerable for all injuries happening through their act or default, or through the act or default of any person in their employment. If the section stopped there it would be impossible to say that where a contract under an Act of Parliament has authorised other persons than the promoters to do an act which they should have done, such act was done by a person in the employment of the promoters. But then comes the second part of the section —"they shall save harmless all road authorities from all damages in respect of such injuries," and it is not easy to see to what case that applies. It does not apply where the road authority has itself done damage to some one else; it cannot mean that. Possibly it means a case where primarily there would be an action against the corporation or road authority for something in respect of which the road authority would be primarily liable, but where the duty is cast by Act of Parliament on the promoters; then, though the road authority might be sued, the promoters might be liable as between themselves and the road authority.

I do not think that the sections of the private Act throw much light on the case, and do not go beyond the powers given by section 29 of the public Act. I am therefore of opinion here that the corporation is liable, and that the County Court Judge was right in nonsuiting in favour of the defendant company.

MATHEW, J.—I am of the same opinion. Section 28 no doubt casts in the first instance the obligation of maintaining the road in repair on the promoters. It contemplates also a case where by their default it goes out of repair, and empowers the road authority then to step in and repair.

(4) 6 Hurl. & N. 488; 30 Law J. Rep. Exch. 81.
(5) 5 B. & S. 981; 34 Law J. Rep. Q.B. 265.

Howitt v. *Nottingham Tramways Co.*

But it is not intended to cast the liability for anything wrongly done by the road authority upon the promoters. Section 29 is to be read as a proviso on section 28. The Legislature contemplates the road authority having taken possession of all the works of the promoters for the purpose of themselves maintaining the road and line in efficient repair. Is there any other section to be considered as bearing on the matter? There is section 55, but it applies, I think, where there is no contract—which is not this case.

I agree that the private Act does not extend the obligation, and therefore need not be discussed.

Rule discharged. Leave to appeal refused.

Solicitors—S. G. Warner, agent for Dowson & Wright, Nottingham, for plaintiff; Torr, Janeways & Co., agents for Wells & Hind, Nottingham, for defendants.

1883. Nov. 19. BOOTH *v.* TRAIL. THE MAYOR AND CORPORATION OF SUNDERLAND (*garnishees*).

Attachment of Debts—Police Superannuation Allowance—11 *&* 12 *Vict. c.* 14—*Instalments of Pension—Order XLV. rule* 2 *—Debt owing or accruing.*

Where, under 11 *&* 12 *Vict. c.* 14, *a retired police constable had become entitled to be paid by the corporation of a borough a superannuation allowance by quarterly payments,*—Held, *that a quarter's allowance, when actually due, was a debt owing and accruing to him by the corporation, and attachable in their hands on the application of the judgment creditor under Order XLV. rule* 2.

This was a garnishee summons, referred by Pearson, J., from chambers to the Court, in which the plaintiff, having an order for the attachment of all debts owing or accruing to the defendant the judgment debtor, sought an order upon the corporation of Sunderland, as garnishees, for payment to him of the debt owing due and to become due by them to the defendant as pension or superannuation allowance.

The plaintiff had recovered judgment for 27*l.* against the defendant, who had been a constable in the Sunderland police force, and who, under 11 & 12 Vict. c. 14, had retired with a pension of 40*l.* a year, paid quarterly. At the date of the summons, one quarter's pay was in the treasurer's hands and due to the defendant.

T. Willes Chitty, for the plaintiff.—This allowance to which the defendant is entitled as of right constitutes a debt from the corporation to him. *Webb* v. *Stenton* (1) probably precludes the attachment of instalments not yet due; but, so far as the treasurer holds money due to the defendant, the order can be made. This is not an attachment of wages of labourer, servant or workman within the Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30); besides, it is contended that that Act does not apply to the Superior Courts. That a pension for past services is capable of being sequestrated as a debt appears from *Willcock* v. *Terrell* (2), *Sansom* v. *Sansom* (3) and *Dent* v. *Dent* (4). If it can be reached by sequestration it is attachable.

Julian Robins, for the corporation.—The cases last cited are distinguishable as not being under garnishee proceedings. Then the Wages Attachment Abolition Act applies to all Courts of Record, and this fund is composed of the accumulation of wages, and is within it.

[STEPHEN, J.—On looking at the whole Act, I think it is clear that inferior Courts of Record only are meant.]

There is no case in which a superannuation allowance has been attached, and it is contrary to public policy that it should be.

[STEPHEN, J.—If it could be reached by sequestration, is there not a legal remedy for its non-payment so as to make it attachable?]

(1) 52 Law J. Rep. Q.B. 584.
(2) Law Rep. 3 Ex. D. 323.
(3) 48 Law J. Rep. P., D. & A. 25; Law Rep. 4 P. D. 69.
(4) 36 Law J. Rep. Prob. & M. 61; Law Rep. 1 P. & D. 366.

Booth v. *Trail.*

In *Gibson* v. *The East India Company* (5) it was distinctly held that a pension could not be attached. The summons is at least wrong in asking for the instalments not yet payable. There must be a *debitum in præsenti* before attachment will be granted and an order to pay made.

Chitty, in reply, cited *Tapp* v. *Jones* (6).

LORD COLERIDGE, C.J.—I am of opinion that Mr. Chitty is entitled to succeed in this application to the extent of having the order for payment made in respect of the debt which has accrued due now. I do not think—and the case of *Webb* v. *Stenton* (1), dealing with the words of the Common Law Procedure Act, 1854, and of Order XLV. rule 2, fully bears out the view—that a sum of money "which may or may not become payable is a debt owing or accruing." Therefore, so much of the summons as asks for an order to pay the instalments of the defendant's allowance which are yet to fall due on the quarter-days subsequent to the date of the summons, cannot stand. That being so, the same case of *Webb* v. *Stenton* (1) seems to imply that, to the extent which I have indicated, the order proposed to be made is right. Money in the hands of a man who cannot refuse to pay it somehow or another is a debt, and, if so, it can be attached, and the order to pay will operate upon it. It is not the less a debt because the statute which creates it does not give a statutory form of remedy for its recovery from the corporation should they fail in their duty to pay it. Here the defendant has a right to the money, and could enforce his right by action. The order will therefore be made, varied by being confined to what was due at the date of the summons.

STEPHEN, J.—I entirely agree with my lord, and will only add a word as to the distinction between this case and that of *Gibson* v. *The East India Company* (5). That case was decided on the peculiar position occupied by the East India Company, which did not contract in any legally binding way with Mallandaine, and therefore his assignee had no right against them. It is not a decision on any principle of general application. In the present case there is a statutory obligation on the corporation of Sunderland to pay the defendant, and therefore they can be ordered to pay the amount to the plaintiff.

Order accordingly.

(5) 5 Bing. N.C. 562.

(6) 44 Law J. Rep. Q.B. 127; Law Rep. 10 Q.B. 591.

Solicitors — Botterell & Roche, agents for S. Alcock, Sunderland, for plaintiff; Brownlow & Howe, agents for Ritson, Sunderland, for garnishees.

1883. Nov. 22. } STRAUSS *v.* THE COUNTY HOTEL AND WINE COMPANY (LIMITED).

Innkeeper's Liability—Loss of Goods by Traveller — Temporary Refreshment at Hotel—"Guest."

The plaintiff arrived at the Carlisle Station, and entrusted his luggage to an hotel porter with the intention of spending the night at the defendants' hotel. On his arrival at the hotel a telegram caused the plaintiff to change his mind, and he therefore gave up his intention of spending the night at Carlisle, and went into the coffee-room for the purpose of getting some refreshments. Not being able to get in the coffee-room what he required, the plaintiff was referred by one of the defendants' servants to the station refreshment-room, which was connected with the hotel by a covered passage, and which was under the management of the defendants, the hotel and refreshment-room being, in fact, held under one licence. On his way to the refreshment-room along this covered passage, the plaintiff met the hotel porter with his luggage, which was at the plaintiff's request deposited in the defendants' lock-up room for luggage. The plaintiff had, and paid for, something to eat and drink in the refreshment-room. On enquiring for his luggage a few hours afterwards, a portion of it was found to be missing. In an action brought against the defendants, as innkeepers, to recover the value of the missing property,—Held, *that there was no evidence to establish the relation of land-*

lord and guest between the plaintiff and the defendants so as to make the latter liable, as innkeepers, for the value of the goods in question.

This was an action tried before Stephen, J., and a special jury at the Carlisle Summer Assizes, 1883.

The action was brought against the defendants, as innkeepers, to recover the value of certain goods belonging to the plaintiff which had been lost or stolen under the following circumstances:—

The plaintiff was engaged by a firm of wine merchants to travel for orders over the north of England, and had occasion in the course of his business to come to Carlisle three or four times a year; on these occasions it was his habit to put up at the County Hotel. The County Hotel adjoined the Carlisle Station and belonged to the defendants, who were also the lessees of the refreshment-rooms at the same station. Both the hotel and refreshment-room were held under one licence.

On the morning of the 18th of December, 1882, between eleven and twelve, the plaintiff arrived by train at the Carlisle station, with the intention of remaining all night at the defendants' hotel. The plaintiff accordingly hailed the hotel porter—who had the exclusive privilege of coming upon the station platform to assist in the conveyance of visitors' luggage from the train to the hotel—and handed to him, amongst other things, a despatch-box and a dressing-bag. The plaintiff then left the porter to get some other luggage out of the van, and proceeded to the hotel through the covered passage which connects the hotel with the station. On his arrival at the hotel the plaintiff received at the office a telegram which made him determine to go on to Manchester the same day. The plaintiff then went into the hotel coffee-room and said he wanted some luncheon, and asked what he could have. One of the waiters replied, "Chops and steaks, and anything to order." The plaintiff, on asking if there was a joint ready, was directed by the waiter to the station refreshment-room. This refreshment-room was not part of the same building as the hotel, but was directly connected with it by a covered passage leading from the hotel to the station. One side of this covered passage adjoined the refreshment-room, but the public entrance to the refreshment-room was from the station platform. On the other side of the covered passage and leading out of it was an hotel luggage-room. The door to this luggage-room was usually kept locked, the key being under the control of the hotel porter. As the plaintiff was proceeding to the refreshment-room from the coffee-room towards the covered passage, he met the hotel porter carrying the luggage, who asked the number of his room. The plaintiff replied that he was not sure whether he should stay overnight, and at his request the luggage was put by the porter into the lock-up room for luggage belonging to the hotel, the entrance to which was, as before stated, from the covered passage. The plaintiff then proceeded to the refreshment-room and had some lunch, which he paid for. On his subsequently enquiring for his luggage the same day, it was discovered that the despatch-box and dressing-case were missing from the luggage-room.

The learned Judge, at the trial, nonsuited the plaintiff, but a rule *nisi* was subsequently granted to set aside the nonsuit and for a new trial on the ground that there was evidence to go to the jury.

Ambrose, Q.C., and *Mattinson*, supported the rule.—The plaintiff was a guest at the defendants' hotel; the defendants therefore are liable as innkeepers for the value of the plaintiff's goods. It is not necessary to stay or sleep at an hotel in order to be a guest; a temporary sojourn for the purpose of taking refreshment is quite sufficient—*Bennett* v. *Mellor* (1) and *Calye's Case* (2).

The refreshment-room was held under the same licence as the hotel, and was, in fact, part of the hotel.

The other side will doubtless rely on *The Queen* v. *Rymer* (3), where it was held that a refreshment bar was not an inn. That case, however, is distinguishable from the present, in which the refreshment-

(1) 5 Term Rep. 273.
(2) 1 Sm. L.C. 6th ed. 105.
(3) 46 Law J. Rep. M.C. 108; Law Rep. 2 Q.B. D. 136.

room is used also as a dining-room, and is connected with the hotel by a covered passage.

[MATHEW, J.—When did the plaintiff become a guest?]

Either when he handed his luggage to the hotel porter at the station, or, at all events, when he went to the hotel and asked for refreshments. It is true the plaintiff did not actually take any refreshment in the coffee-room, but this was entirely due to the waiter's suggestion that the refreshment-room was a more convenient place to get what was required. This refreshment-room was under the same management as the hotel and supplied from the hotel. The plaintiff, in fact, merely went from one part of the hotel to another.

E. Page (*J. W. Lowther* with him), for the defendants, were not called upon to argue.

LORD COLERIDGE, C.J.—I am of opinion that this rule must be discharged. It appears that the plaintiff, who was a traveller, arrived at the Carlisle Station, and entrusted his luggage to a porter to be conveyed to an inn where he intended to become a guest. Shortly after his arrival at the inn a telegram caused him to change his mind, and he thereupon gave up his intention of becoming a guest, but asked if he could have something to eat and drink. On being answered in the affirmative, the plaintiff enquired for the coffee-room. On making known his wants there he was told that he would do better if he went to the refreshment-room, which forms a part of the station, though the refreshment-room belongs to, or is at all events under the management of, the defendants. At this refreshment-room, which is not part of the inn, though connected with it by a covered passage, the plaintiff gets what he requires to eat and drink, having ordered the hotel porter to lock up his luggage meanwhile. The plaintiff on making enquiries for his luggage the same day, discovered that a portion of it was missing. The question under these circumstances arises whether an action will lie against the defendants, the proprietors of the hotel, as innkeepers, to recover damages for the loss which the plaintiff has sustained.

Now what we have to consider is, whether at the time of the loss the plaintiff was such a guest as to make the innkeeper liable. I confess I can see no evidence of the plaintiff having become a guest either in the ordinary or legal sense of the term. The cases cited by Mr. Ambrose do not, in my judgment, assist the plaintiff's case. *Bennett* v. *Mellor* (1) is clearly distinguishable, because there the relation of landlord and guest was established, and when once that is done it matters not for how short a time the relationship continued. The point of Mr. Justice Buller's judgment is that the goods were taken away while the plaintiff's servant was in the inn as a guest taking refreshment. That case does not assist Mr. Ambrose for the reason that here there was no such relation of landlord and guest between the plaintiff and the defendants. The case of *The Queen* v. *Rymer* (3) is an authority against him, because in that case the bar was actually part of the hotel, and yet it was held that the relation of landlord and guest had not been established. There is a broad distinction between the liability of a landlord as regards the goods of his guest and the goods of other persons who are not guests. "If," says Bacon in his *Abridgment*, tit. "Inns and Innkeeper," "a man comes to an inn with a hamper in which he hath several goods, and goes away leaving this with a host, and two days after comes again, but in the time of his absence this is stole, he shall have no action against the host, for at the time of the stealing he was not his guest, and by the keeping the hamper the host had no benefit, and therefore shall not be charged with the loss of it in his absence." We do not at all lay it down that no action would lie against the defendants as bailees if the loss were occasioned under such circumstances as would make them liable. No such question arises here, and what we decide is that there is no evidence here to establish the relationship of landlord and guest, which is necessary in order to make the defendants liable as innkeepers.

MATHEW, J.—I am of the same opinion, on the ground that the relationship of landlord and guest was not established at the trial. Mr. Ambrose has contended that this relationship was established either with the porter at the station or

Strauss v. *The County Hotel Co.*

with the waiter in the coffee-room. The luggage was no doubt entrusted to the porter upon the assumption that the plaintiff might become a guest at the inn, but he had not finally made up his mind on the subject when a telegram came which made him resolve not to stay. He then went to the coffee-room, and afterwards to the refreshment-room, where he got something to eat and drink. In the mean while he told the porter to put his luggage into the lock-up. It is just as if the plaintiff had said "I am uncertain whether I will stay at the hotel; put my luggage into the lock-up." I see no evidence whatever of the relationship contended for, and am accordingly of opinion that the nonsuit was correct.

Rule discharged.

Solicitors—George Johnson, agent for E. & E. L. Hough, Carlisle, for plaintiff; James, Son & James, agents for Clutterbuck & Trevenen, Carlisle, for defendants.

1883. Dec. 10. } THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT.

County Courts—Admiralty Jurisdiction —32 & 33 Vict. c. 51. s. 2—"The Carriage of Goods in any Ship."

A claim for the loss of the luggage of a passenger on board a ship is not a claim "in relation to the carriage of goods in any ship" within the County Courts Admiralty Jurisdiction Act, 1869, *and there is no jurisdiction to try it conferred by that Act.*

Rule to the Judge of the City of London Court to shew cause why he should not proceed to hear and determine a certain Admiralty action *in rem*. The action was brought to enforce a claim for damages for the loss of the plaintiff's personal luggage while on board the defendant's ship as a passenger from Hamburg to London. The luggage was placed in the hold of the ship, and was not under the plaintiff's control. The Judge of the City of London Court held that he had no jurisdiction to try the case.

G. Barnes, for the defendant, shewed cause.—The question is whether a claim for passenger's luggage is a "claim arising out of any agreement made in relation to . . . . the carriage of goods in any ship." If the liability is put on the defendants as common carriers the action is not on an agreement, but on a *tort*. If on an agreement, the agreement was not to carry goods, but to carry the passenger, with an allowance for personal luggage. He referred to *Brown* v. *Stapleton* (1).

Edward Pollock, for the plaintiff, argued, on the authority of *Cohen* v. *The South Eastern Railway Company* (2), that luggage was goods, and that a contract to carry a man and his luggage was a contract to carry goods.

DAY, J.—I think the Judge of the City of London Court was quite right in his decision. The Act must be construed on its own words, and I do not think that the cases cited help much. The first part of the section gives jurisdiction over "any agreement made in relation to the use or hire of any ship"; that suggests charter-parties. Then it goes on, "or in relation to the carriage of goods in any ship"; that suggests bills of lading. I am asked to extend the meaning of this last phrase so as to cover a claim by a passenger on board a ship for the loss of his luggage. This is an agreement in relation to the carriage of a passenger, not of goods. The luggage is carried as incidental to carrying the passenger. The luggage can only be personal luggage, which is not goods in the sense as gathered from the context, "the hire of ships."

SMITH, J.—I am of the same opinion. By 31 & 32 Vict. c. 71. s. 3, jurisdiction was first given over claims for damage to "cargo." Next year the jurisdiction was extended to the hire of ships and the carriage of goods. The latter phrase looks very much as if bills of lading alone were referred to. It can hardly have been in-

(1) 4 Bing. 119.
(2) 46 Law J. Rep. Exch. 417; Law Rep. 2 Ex. D. 253.

tended that the ship should be arrested for the loss of a carpet-bag. The Act, in my opinion, was dealing with merchandise.

Rule discharged.

Solicitors—R. Greening, for plaintiff; Stokes, Saunders & Stokes, for defendant.

1883. Dec. 10.

SHAW *v.* SIMMONS.

Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4—*Association "formed after commencement of the Act"—Partnership.*

An association, consisting of more than twenty persons, instituted in 1861, *but having new members from time to time down to the present, is not an association "formed after the commencement of the Act" within the meaning of the Companies Act*, 1862, *and therefore does not require registration.*

CASE stated on appeal from the County Court Judge at Birmingham in an action brought on a promissory note for 11*l.* 16*s.* 11*d.* made by the defendant, together with two sureties, in favour of the plaintiff.

The plaintiff and defendant were members of a society, called the No. 2 Permanent Money Society, consisting of 350 members, contributing annually about 6,200*l.* The plaintiff was one of the trustees of the society. In the year 1861 a certain number of persons associated themselves for the purpose of mutual loans under this name. Some of those who then so associated themselves are still members, but most of the present members have become members since the coming into operation of the Companies Act, 1862. Members may join on any club night and for any number of shares, provided that they are not liable to contribute in respect of more than 300*l.* at any one period. The money in hand is sold to the highest bidder among the members in shares varying from 20*l.* to 100*l.*, and the premium bid by the purchaser is divided as profit among the members, after deducting a small proportion as a reserve fund. The promissory note in question was given to the plaintiff as one of the trustees of the society to secure a 50*l.* share purchased by the defendant. The society was not registered or incorporated. The County Court Judge gave judgment for the plaintiff.

Nathan, for the appellant.—The trustee of an illegal association cannot sue on a note like this—*Jennings* v. *Hammond* (1). The 4th section of the Companies Act, 1862, provides that "no company, association or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any . . . . business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless it is registered as a company under this Act." This association satisfies all the terms of that section, and being unregistered is illegal. The present association was formed since the Act. Every new partner makes a new partnership, otherwise a business founded before 1862 might have changed hands any number of times and gathered any number of partners, and yet not require registration.

He cited *Bear* v. *Bromley* (2), *In re Aston* (3) and *Smith* v. *Anderson* (4).

Jelf, Q.C., and *Hugo Jones* were not called upon.

DAY, J.—I am of opinion that this appeal must be dismissed. The question is, whether this is a company, association or partnership formed since 1862. It is not altogether free from difficulty, if the association be considered as a partnership. A partnership between A, B and C is a different partnership from that between A, B, C and D. The question is, whether the word "formation" is to be taken in its ordinary or strict sense. I think that this association was, within the meaning of the Act, formed in 1861. It was not formed on the last occasion when some new members were admitted. It would, in my

(1) 51 Law J. Rep. Q.B. 493; Law Rep. 9 Q.B. D. 225.
(2) 18 Q.B. Rep. 271; 21 Law J. Rep. Q.B. 354.
(3) 27 Beav. 474; 28 Law J. Rep. Chanc. 631.
(4) 50 Law J. Rep. Chanc. 39; Law Rep. 15 Ch. D. 247.

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opinion, be torturing the Act of Parliament to construe it so. It would be an enforced, unnatural and an unduly strained construction of the Act.

SMITH, J. — The case turns on the meaning of section 4. The intention of the Legislature was to deal with companies afterwards to be formed. It was argued that this association is formed every time a new partner is admitted, but the intention was that existing companies shall not be touched. When was this company formed? It was in 1861, *quâ* company. It was a mere accident that there were new shareholders afterwards.

Appeal dismissed.

Solicitors—Mackeson, Taylor & Arnould, agents for Buller, Bickley & Cross, Birmingham, for appellant; Robinson, Preston & Stowe, agents for John Price, Birmingham, for respondent.

1883. June 20. HOLLINS *v.* VERNEY.

Prescription Act (2 & 3 *Will.* 4. *c.* 71), *s.* 2—*Right of Way—Easement—Removal of Wood cut at Intervals—Non-continuous User.*

In order to constitute a claim to a right of way, under the provisions of section 2 *of the Prescription Act* (2 & 3 *Will.* 4. *c.* 71), *there must be proof of an actual enjoyment and exercise of the right claimed during the first year of the period relied upon.*

In an action for trespass on certain land belonging to the plaintiff, the defendant, by his statement of defence, pleaded a right of way under section 2 *of the Prescription Act, by reason of twenty years' user, as of right. The right of way claimed by the defendant was in respect of the removal of timber over an ordinary metalled road, which led to some mills the property of the plaintiff, and passed for some distance alongside a wood which belonged to the defendant. There was a gate from this road into the wood, and the wood for about half a mile sloped sharply down to the road. At the end of the slope there was a way by which carts could pass from the road to the upper part of the wood. The timber on this slope was not cut at the same time, but at intervals of several years, the last cutting having been in the year in which the action was commenced, the previous cutting fifteen years before, and the next at another interval of fifteen years. At the time of such cuttings the defendant had used the road as often as he wished, without interruption, for the purpose of removing timber, for a period of upwards of thirty years:—*

Held, *that the claim, being only to use the way at certain periods, did not satisfy the requirements of section* 2 *of the Prescription Act.*

This was an action for trespass upon certain lands belonging to the plaintiff. The defendant, by his statement of defence, averred that the alleged trespasses were committed in the exercise of a right of way for cutting wood under the Prescription Act.

At the trial before Cave, J., at the Nottingham Assizes in February, 1883, it appeared that the way in question was an ordinary metalled road, which passed for some distance along a large wood belonging to the defendant, to some large cotton mills the property of the plaintiff. There was a gate from this road into the wood, and the wood for about half a mile sloped sharply down to the road. At the end of the slope there was a way by which carts could pass from the road to the upper part of the wood. The timber and underwood on the whole of this slope were not cut at one and the same time, but in parts, and in rotation, and at intervals of several years, the whole of the slope being cleared about every fifteen years.

Witnesses were called on behalf of the defendant, who proved that they had purchased the wood at each cutting, and carted what was cut upon the upper part of the slope down to and along the road without any interruption; and that this had continued for more than thirty years, down to the commencement of the action, the last cutting having been in the year in which the action was commenced, the previous cutting fifteen years before, and the next at another interval of fifteen years. Between these intervals the road was at times stopped up.

Cave, J., told the jury that the fact that the passage from the road to the wood was occasionally stopped up would not defeat the defendant's right, if he had for twenty

years so used it as often as he wished—that is, while the wood was being cut; and he left to them the question whether there had been a user of the way for twenty years within the statute.

The jury found for the defendant.

A rule *nisi* was afterwards obtained to shew cause why there should not be a new trial, on the ground that there was no evidence to go to the jury of any right within the Prescription Act.

W. Graham (*J. C. Lawrance, Q.C.*, with him) shewed cause on behalf of the defendant.—The question is whether, in cases where there has been user for over thirty years before the commencement of the action, a right can be defeated merely by shewing that during a portion of those years the right has not been exercised. *Carr* v. *Foster* (1) is an authority to shew that disuser during any portion of the intermediate period does not necessarily defeat a prescriptive right under 2 & 3 Will. 4. c. 71. The exercise of such a right as is here claimed cannot be otherwise than intermittent. In *Earl de la Warr* v. *Miles* (2) this point is expressly treated by James, L.J., as an open one.

[LORD COLERIDGE, C.J.—In *Gale upon Easements*, Mr. Willes states, in a note, that actual user must be shewn during the first and last year.]

No doubt that is so as regards the last year—*Parker* v. *Mitchell* (3); but the authorities cited by Mr. Willes, namely, *Bailey* v. *Appleyard* (4) and *Carr* v. *Foster* (1), do not decide the point so far as the first year is concerned. Here there was actual user in the last year, and the fact that before the commencement of the twenty years the defendant used the way whenever he had occasion to do so is sufficient.

J. W. Mellor, Q.C. (*E. W. Garrett* with him), for the plaintiff, in support of the rule.—The Prescription Act contemplates a continuous user, and only applies to cases where there has been an enjoyment of the right claimed at least once a year—see judgment of Parke, B., in *Lowe* v. *Carpenter* (5).

[He was stopped by the Court.]

LORD COLERIDGE, C.J.—I am of opinion that judgment in this case should be entered for the plaintiff. The question we have to decide is, whether the defendant has made out a right to do what is complained of under the Prescription Act. In order to have acquired such a right, he must shew that he had actually enjoyed the easement without interruption for a period of twenty years. Now the easement claimed was the right to carry off such wood as was cut upon a particular slope near this way in question; and the proof was that this was a coppice which was cut at intervals, which were not very clearly ascertained, the whole wood being cleared at three cuttings of three successive years. There was proof also that the last cutting was just before the commencement of the action, and the last cutting before that was fifteen years before, which was within the period of twenty years; and the cutting before that was outside the period of twenty years, and so could not be included in the twenty years' enjoyment.

It was contended by Mr. Graham that, although the right had not been actually enjoyed, or rather used, for the prescribed period, nevertheless it was such a right as might subsist without being actually exercised; and that if it had been exercised from time to time, partly before and partly after the period of twenty years had begun to run, the statutory requirements would be satisfied. But I am of opinion that Mr. Graham's contention is not well founded, and that, in the case of a right claimed under the Prescription Act, the words of the Act must be complied with, which can only be done when there is shewn to exist an actual, real, physical and positive enjoyment without interruption for the full period of twenty years. The result of such a conclusion will be to apply to this particular easement the words of Baron Parke in *Lowe* v. *Carpenter* (5), and to say that, inasmuch as the Act of Parliament creates a special kind of property, the words of the statute must be complied with, otherwise the statute does

(1) 3 Q.B. Rep. 581; 11 Law J. Rep. Q.B. 284.
(2) 50 Law J. Rep. Chanc. at p. 768; Law Rep. 17 Ch. D. at p. 600.
(3) 11 Ad. & E. 788.
(4) 8 Ad. & E. 161, and p. 788 note; 7 Law J. Rep. Q.B. 145.
(5) 6 Exch. Rep. 825; 20 Law J. Rep. Exch. 377.

not affect this particular right. This is a kind of easement capable of being claimed at common law if the evidence supports it, but not capable, for reasons I have already given, of being claimed under the Prescription Act. The statute cannot be taken (to use Baron Parke's words) to apply to cases where "the rights mentioned in it are used at intervals of two or three years, for in such cases a party could not acquiesce for one year under the 4th section of the Act, if the act or matter is done only at intervals of two or three years." That is the rule, and it has been incorporated into books of authority, and would suffice, perhaps, to dispose of the matter before us had it not been that cases had been cited, which, in my judgment, in no way touch the present question. *Parker* v. *Mitchell* (3) decides that actual user during the last year, and *Bailey* v. *Appleyard* (4) that actual user during the first year, must be proved. It is clear, therefore, that in the first and last years there must be an actual enjoyment of the right claimed, and the law is so summarised by Baron Parke in *Lowe* v. *Carpenter* (5). Here it is clear that this necessary incident to the acquirement of this right cannot be proved to have existed. Therefore, upon the authority of the cases and the true interpretation of the statute, as well as the judgment of Baron Parke, I am of opinion that the provisions of the Prescription Act do not apply, although such a right may be claimed and made out at common law, provided that there is evidence to support it.

The only remaining question is, what course we ought, under the circumstances, to adopt? We have the whole of the facts before us, and our judgment is one which really results from the construction of the law applicable to the right claimed under the Prescription Act. The only defence which has been put forward to this action fails, and it is not suggested that there is any other defence. We think, therefore, that we are, under the circumstances, well warranted under the Judicature Act in giving judgment for the plaintiff with forty shillings damages.

DENMAN, J.—I am of the same opinion. I only wish to add that I base my judgment on the ground that it is clearly established that, in order to bring a case within the section of the Act relied upon, there must be some proof of an actual enjoyment and exercise of the right claimed during the first of the twenty years which are material. Here the enjoyment is disproved, for, according to the evidence on both sides, this way was never used during the first year; and from the very nature of the claim itself, it being only a claim to use the way at certain periods, it clearly comes within the description of Baron Parke in *Lowe* v. *Carpenter* (5), and is a claim to which the Act is not applicable. I think, therefore, that the plaintiff ought to have judgment for a nominal amount.

MANISTY, J.—I am of the same opinion. The 2nd, 4th and 6th sections of the Act must be looked to, and the 2nd section only gives this statutory right where there has been an "actual enjoyment" by the person claiming the right "for the full period of twenty years," which, under the 4th section, must be next before the action. Under the 6th section, "no prescription is to be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in the Act as may be applicable to the case and to the nature of the claim." This action was brought in 1882; there is no evidence of the right which is claimed having been exercised during the first of the twenty years prescribed by the Act. The same observation applies to forty years, because this right is said to be founded on twenty or forty years' enjoyment. Then, if that be so, there is no statutory point at which the right was exercised which would bring it within the Act, and, upon that point, I think our judgment ought to be given in favour of the plaintiff. It is unnecessary for us to decide whether *Carr* v. *Foster* (1) was well decided or not; that case has never been overruled, and there seems to be good sense and substance in the ground on which it was decided.

Judgment for plaintiff.

Solicitors—Field, Roscoe & Co., agents for Dowson & Wright, Nottingham, for plaintiff; Geare, Son & Pease, agents for Martin & Sons Nottingham, for defendant.

[IN THE HOUSE OF LORDS.]

1883. June 8, 11, 12. July 16. } MILDRED, GOYENECHE AND COMPANY *v.* MASPONS Y HERMANO.

Principal and Agent—Unnamed Foreign Principal—Goods consigned by Foreign Agent to English Consignee—Insurance by Consignee—Loss—Rights of Parties to Insurance Moneys—Factors Act (6 *Geo.* 4. *c.* 94), *s.* 1.

D. & Co., merchants in Havannah, consigned goods in their own names to the appellants, their correspondents in London, who insured them at the request of D. & Co. on behalf of all parties interested. In letters received by the appellants before they effected the insurances, D. & Co. mentioned that they were acting for an unnamed principal. They were, in fact, agents for the respondents, to whom the goods belonged. The goods were lost at sea, and D. & Co. shortly after became bankrupt. The appellants received the insurance moneys, but, before doing so, had notice that the respondents claimed them. The appellants claimed a lien upon the moneys for the whole amount due to them on their general account with D. & Co.:—Held, *that, as against the respondents, they were entitled to a lien only for their charges in respect of the insurances; that the respondents could sue them for the balance; that it was immaterial to consider whether the contract between D. & Co. and the appellants was made under the law of Spain or the law of England, or whether there was any privity of contract between the appellants and the respondents, for that the respondents' right was not derived from the contract, but was a right of property consequent upon their property in the goods.*

This was an appeal from a decision of the Court of Appeal (reported 51 Law J. Rep. Q.B. 604; Law Rep. 9 Q.B. D. 530), which reversed a judgment of Manisty, J., in favour of the defendants, the present appellants. The facts fully appear in the judgment of Lord Blackburn.

Cohen, Q.C., and *Davey, Q.C.* (*Arbuthnot* with them), for the appellants.—The appellants, as consignees for sale, would have had a lien for general balance of account if there had been no third party—*Story on Agency*, ss. 111, 375, 376, which are mainly founded on *Godin* v. *The London Assurance Company* (1). As insurance brokers, they would also have a general lien in the absence of knowledge of any third party at the time of insuring—2 *Duer on Insurance*, p. 285, 1 *Arnould on Marine Insurance* (5th ed.), pp. 210, 213, *Mann* v. *Forrester* (2) and *Westwood* v. *Bell* (3). Here the provisional policies were effected by the 3rd of August, and the rights of the parties should be treated as fixed then—that is, before there was notice of a third party—*Xenos* v. *Wickham* (4), *Armstrong* v. *Stokes* (5) and *The New Zealand, &c., Land Company* v. *Watson* (6).

There was no privity of contract between the appellants and respondents. It is an attempt by a foreign principal, unknown at the time of the contract, to come in after the agents' insolvency and deprive the insurers of their lien. But it is settled that in the case of a foreign principal the English merchant looks to the agent alone—*Armstrong* v. *Stokes* (5), and cases there cited. The agent there was an Englishman; but that fact was not made a ground of the judgment—*Hutton* v. *Bullock* (7) and *Elbinger Actien Gesellschaft* v. *Claye* (8). Besides, the contract must be taken to have been made under the Spanish law, which gives an undisclosed principal no right on the contract made by his agent. The respondents can therefore only sue in the right of Demestre & Co., and subject to the appellants' general lien.

The Solicitor-General (*Sir F. Herschell*) and *Barnes*, for the respondents.—This is no exception to the general rule that an undisclosed principal may sue on a con-

(1) 1 Burr. 489.
(2) 4 Camp. 60.
(3) 4 ibid. 349.
(4) 36 Law J. Rep. C.P. 313; Law Rep. 2 H.L. 296.
(5) 41 Law J. Rep. Q.B. 253; Law Rep. 7 Q.B. 598.
(6) 50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374.
(7) Law Rep. 9 Q.B. 572.
(8) 42 Law J. Rep. Q.B. 151; Law Rep. 8 Q.B. 313.

tract made by his agent. The inconveniences pointed out in the *dicta* in *Armstrong* v. *Stokes* (5) would apply quite as strongly here to a suit by or against the agent, since they were based on the fact that the jurisdiction was foreign—*Story on Agency* (9th ed.), par. 290, *New Zealand &c., Land Company* v. *Watson* (6) and *Kaltenbach* v. *Lewis* (9).

There was privity of contract between the appellants and respondents — *De Bussche* v. *Alt* (10) and *Story on Agency*, ss. 201, 217*a*. But, apart from the question of privity, the respondents claim their own property. When the policies were effected the appellants knew that they were for the benefit of persons other than Demestre. No contract was established by the passing of the slips on the 3rd of August. No usage was found by the jury in favour of the appellants' contention, and it is not supported by any authority in law—*Man* v. *Shiffner* (11), *Parker* v. *Elding* (12), *Fish* v. *Kempton* (13), *Semenza* v. *Brinsley* (14), *Pannell* v. *Hurley* (15), *Bodenham* v. *Hoskins* (16), *Ex parte Kingston* (17), *Ex parte Dixon* (18), *In re Hallett's Estate* (19), *Lanyon* v. *Blanchard* (20) and *Maanss* v. *Henderson* (21).

Davey, Q.C., in reply.

Cur. adv. vult.

LORD BLACKBURN (on July 16).—I have come to the conclusion that the order appealed against is right and should be affirmed.

The dispute arises out of the insolvency of Demestre Chia & Co., a firm of merchants carrying on trade at Havannah. The appellants, Mildred & Co., are merchants trading in London, and were correspondents of Demestre Chia, who, at the time they stopped payment, on the 18th of September, 1880, were largely indebted on the balance of the account between them to Mildred & Co. On the 28th of July, 1880, Mildred & Co. received from Demestre Chia a telegram in the following terms:—"Insure all risks, 8,000*l*. Cargo tobacco, Spanish schooner *Bachi*, first veritas; destination Gibraltar; consigned to you."

Their answer by letter was:—"In accordance with your instructions, we have opened a provisional policy for said amount, at the premium of 60*s*. per cent., sailing on the 1st of August; 80*s*. per cent., sailing on the 20th of August; 6*l*. 6*s*. after last date. To pay particular average, if it amounts to five per cent. on each series of ten bales running numbers on landing. On receipt of shipping documents, we will have the policy duly extended." On the 3rd of August, they received a further telegram dated the 31st of July:—"*Bachi* despatched to-day; will sail to morrow; insure 3,000*l*. more." And they accordingly increased the provisional insurance to 11,000*l*.

No explanation was given at the trial as to what a provisional policy was, and I do not recollect ever to have met with the phrase before; but this much is plain, that all the terms of the policy were agreed on, but that Mildred & Co. were not to make themselves liable to the underwriters for the premiums until they had in their possession the shipping documents, so as to have something on which they had a hold; and that they did make themselves liable for the premiums as soon as, and not till, they had got those shipping documents.

On the 9th of August they received a letter from Demestre Chia, enclosing the charter-party of the *Bachi*. I shall have to read that letter afterwards. I need at present only say that the charter-party was in the name of Demestre Chia. On the 17th of August they received a letter dated the 31st of July, which I shall also have to read. It is

(9) 52 Law J. Rep. Chanc. 881; Law Rep. 24 Ch. D. 54.
(10) 47 Law J. Rep. Chanc. 381; Law Rep. 8 Ch. D. 286.
(11) 2 East, 523.
(12) 1 ibid. 352, 354.
(13) 7 Com. B. Rep. 687; 18 Law J. Rep. C.P. 206.
(14) 18 Com. B. Rep. N.S. 467; 34 Law J. Rep. C.P. 161.
(15) 2 Coll. 241.
(16) 21 Law J. Rep. Chanc. 864.
(17) 40 Law J. Rep. Bankr. 91; Law Rep. 6 Chanc. 632.
(18) 46 Law J. Rep. Bankr. 20; Law Rep. 4 Ch. D. 133.
(19) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696.
(20) 2 Camp. 597.
(21) 1 East, 335.

enough at present to say that it enclosed the bills of lading and invoice of the cargo of tobacco per *Bachi*, and that both of those were in the name of Demestre Chia, and that the letter repeated the telegram, stating that "the *Bachi* was despatched to day, Saturday; will sail to-morrow."

Mildred & Co., now having the shipping documents, proceeded to have the policies, to use their own phrase, extended. The first was a policy with the Royal Exchange Assurance Company, in the ordinary form of the policies of that company:—"Mildred, Goyeneche & Co., as well in their own name as for and in the names of every other person or persons to whom the same doth, may or shall appertain in part or in all, doth make assurance and causeth themselves and them and every of them to be assured, lost or not lost, at and from Havannah to Gibraltar," on tobacco valued at 11,000*l.*, per *Bachi*. The policy then proceeded, in the usual form of such policies, to specify that the premium was to be three per cent. on 3,500*l.*, part of the 11,000*l.*, and the seal of the company was affixed on the 18th of August, 1880.

Mildred & Co. seem to have shewn the telegram of the 31st of July, and from it it was naturally but erroneously thought that the *Bachi* sailed on the 1st of August, and that the premium therefore was to be three per cent. It was discovered afterwards that she did not sail till the 4th of August, and therefore that the premium ought, according to the terms provisionally agreed upon, to have been four per cent. This error was corrected by an indorsement under the seal of the company, bearing date the 29th of September, 1880; but the policy itself bore date the 18th of August. Two other policies, one in the Universal Marine for 3,500*l.*, and another in the Marine Insurance for 4,000*l.*, were executed on the same 18th day of August. They were in the forms adopted by those companies, and therefore differed slightly in form, but in substance were precisely the same as that with the Royal Exchange Assurance Company. Each was "lost or not lost," each was for a premium of three per cent., and on each was a memorandum rectifying this mistake.

The position of Mildred & Co. was that they held the charter-party, invoice and bills of lading of the tobacco by the *Bachi*, all made out in the name of Demestre Chia. They also held three policies on this tobacco to the aggregate amount of 11,000*l.*, insured in their own names, lost or not lost, and for the premiums on which they had pledged their credit to the companies. That being so, the *Bachi* was lost on the 13th of August, and news of this event arrived in London on the 23rd of August. Mildred & Co. proceeded to make claims on the insurance companies. They were adjusted as a total loss, and on the 8th of October the companies paid to Mildred & Co. 10,881*l.* 13*s.* 11*d.* It is not explained, and is not now material, why they did not pay 11,000*l.*

In the mean time, Demestre Chia stopped payment on the 18th of September, the balance of the account between Demestre Chia and Mildred & Co. being heavily in favour of Mildred & Co. The respondents, Maspons & Brother, who were a firm trading at Havannah, gave notice to Mildred & Co. that the Maspons were owners of the cargo by the *Bachi*, and claimed the insurance money. The precise date is not, I think, given, but it was admitted at the trial that it was before any portion of the money was received by Mildred & Co.

It was never, I think, disputed by any one that Mildred & Co. had a right to retain so much of the insurance money as would repay them the premiums, stamps, and commission in respect of this transaction of insurance; but Mildred & Co. claimed a right to retain the whole money until they were repaid all for which they could establish a lien against Demestre Chia. This was denied by Maspons, and the action was brought to try that question.

I pass by, at present, all questions about the form of the pleadings, and about privity of contract and agency, on which a good deal of argument has been employed both in the Court below and at your Lordships' bar. I will say a few words on those points afterwards. For the present I address myself exclusively to the question on the merits, which not only is of importance to the parties as involving a large sum of money, but is of great public im-

portance as affecting the very extensive business carried on by merchants dealing with foreign correspondents, who are entrusted, on commission, by others with goods for consignment or sale, and ship them in their own names. I think, however, when the documents proved, and the answers of the jury to the questions asked them at the trial are considered, this question on the merits, though very important, is not of much difficulty.

Maspons & Brother were a firm trading at Havannah. They had had previous dealings with Demestre Chia, entrusting them with goods for consignment, on which Demestre Chia sometimes made them advances. Demestre Chia had shipped those goods in their own name to their own correspondents, who conducted the transactions abroad according to the orders they had received from Demestre Chia. The returns always were consigned to Demestre Chia, who accounted for them to Maspons & Co., and for all this Demestre Chia charged Maspons & Co. a commission. This is a common course of business. One great object in conducting business thus is that as the returns pass through the commission-merchant's hands he has a security for any advance he may have made; and the entrusting party often, if not always, gets an advance which he would not otherwise obtain. Maspons not only knew that Demestre Chia had a correspondent in London, but they knew the name of that correspondent to be Mildred & Co., and that they were a house in good repute. They never, however, had any communication with them direct until they made the claim on the policies, and Mildred & Co. did not till then know the name of Maspons at all.

Maspons had entrusted Demestre Chia with a small quantity of tobacco for sale in Gibraltar, by way of trying the market, which Demestre Chia had shipped in their own names; and Maspons were contemplating a greater adventure if that small sample fetched a good price. I mention this as explanatory of the letters which I shall presently read, on which, in my mind, the question depends.

Maspons & Brother, having made up their minds to enter on this greater adventure, purchased the tobacco, which was afterwards shipped by the *Bachi*. They applied, partly by word of mouth and partly in writing, to Demestre Chia to conduct this consignment for them on commission. They evidently expected that Demestre Chia would, besides making the necessary shipping disbursements which they did, make them a large advance; but, probably owing to their stoppage, no such advance was in fact made. They negotiated for arrangements that the tobacco should be sold under the superintendence of Mildred & Co., whom they knew to be Demestre's English correspondents, and that the proceeds should be transmitted by Mildred & Co. to Demestre Chia; but, the tobacco having perished at sea, those arrangements never came into operation.

Maspons (it is not now material to enquire what influenced them to do so) having arranged with the captain of the *Bachi* the terms of the charter, caused it to be made out by him, with Demestre Chia, in their own name. The invoice was also made out in Demestre Chia's name as shipped by them to Mildred, Goyeneche & Co., London, for account and risk of whom it might concern. The bills of lading also were made out in the name of Demestre Chia, deliverable to their order. Maspons at first requested Demestre Chia to insure the goods with the "Lloyd Habanero," but changed their minds and requested them to have them insured in London, which was accordingly done, as I mentioned before. And then the two letters were put in evidence, that of the 24th of July which enclosed the charter-party, and that of the 31st of July which enclosed the invoice and bills of lading. Of those I will now read from the letter of the 24th of July the part bearing on this transaction from the translation from the Spanish:—"Although we have not received advice from you with regard to the bales of tobacco which we shipped to you by way of trial, in view of the news of the rise of tobacco in the German markets, the *interesado* has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi*, Captain Uribe, for Gibraltar and Marseilles, on the conditions stated in the enclosed

charter-party. The cargo will consist of 1,500 tierces leaf tobacco, and about 550 quintals picadura (cigarette tobacco), which we are going to ship to your consignment with B/ lading to order, that you may order the reshipment in Gibraltar of the whole or part to whatever destination you may judge most convenient. You will also consign the ship, forwarding to your correspondents in Gibraltar the charter-party. The cargo, in order to please the *interesado*, we will insure here with the 'Lloyd Habanero.' It may be found convenient to keep some tierces of tobacco and picadura in Gibraltar, and ship by the same vessel 250 quintals picadura for Marseilles. In that case you will give your orders accordingly, and have the remaining tierces reshipped. We will forward you in due course the invoice and B/ lading, and we propose despatching the vessel in about eight days."—"Messrs. Mildred, Goyeneche & Co., London. Havana, July 31, 1880. We confirm our letter of the 24th instant, of which we enclose duplicate, with that of the invoice of drafts B/ lading of spars per *Eduardo* and charter per *Bachi*. . . . . We are despatching the *Bachi*, which sails to-morrow for its destination, and we enclose B/ lading and invoice of its cargo, comprising: M.G.C. 1/1,500 tierces leaf tobacco, 1/156 barrels ground picadura, 1/154 bags tobacco, 1/50 boxes pressed picadura—which you will please sell for the best, as if it were your own affair, in accordance with our letter of the 24th instant. The invoice amounts to $50,854.61 gold, and against this shipment we propose to value upon you for the present 3,000*l.* to 4,000*l.* at 60 ^{d}/, sight. We mentioned to you in our last that, to oblige the *interesado*, we would effect here with the 'Lloyd Habanero' the insurance on said shipment; but, having convinced him of the convenience of effecting it with you, we requested you on the 27th instant per cable to do as follows:—'Insure all risk, 8,000*l.*, cargo tobacco, Spanish brig *Bachi*, first veritas; destination Gibraltar; your consignment,' which we confirm; and, having cost more than we thought, we are going to cable you again '*Bachi* despatched to-day, Saturday; will sail to-morrow; insure 3,000*l.* more.' We are, &c. (signed) Demestre Chia Co."

Mr. Justice Manisty, who tried the cause, left to the jury nine questions. I do not quite make out why the ninth question was asked. The special jury answered them, and I do not see how on the evidence they could have answered them in any other way than they did. The questions and answers were as follows:—"1. Were the goods which constituted the cargo in question the property of the plaintiffs?—Yes. 2. Were the defendants employed by the plaintiffs to sell the goods in question for them and to account to them for the proceeds, and did the defendants accept that employment?—Not employed directly for plaintiffs, and defendants did not accept such employment. 3. Or were the defendants employed by Demestre & Co. to sell the goods and account to them for the proceeds, and did they accept that employment?—Yes. 4. Did the defendants know or have reason to believe that Demestre & Co. were acting as agents for some other person or persons not named?—Yes; they knew or had reason to believe it. 5. Were the defendants employed by the plaintiffs to receive the amount of the insurances for them, and to account to them for the same, and did they accept that employment?—No. 6. Did the defendants receive the amount of the insurances as agents for and on account of the plaintiffs, or as agents for and on account of Demestre & Co.?—They received it for and on account of Demestre & Co. and the individual interested. 7. Did the plaintiffs authorise Demestre & Co. to ship and consign the goods to the defendants in their own names, and were they so shipped and consigned?—Yes. 8. On whose behalf and for whose benefit were the insurances effected?—For all parties whom it might concern. 9. Is there a usual, ordinary and well known course of business between foreign consignors and merchants in London, for the latter to make advances to the former against goods and usual shipping documents on the terms that the London merchants are to be entitled to hold the proceeds of all the goods so consigned, or, if they are lost by the perils of the seas, the insurance money against any balance that may be due to them on their general account current with the consignors?—There is not suffi-

cient evidence to enable the jury to decide."

Mr. Justice Manisty seems to have felt that he was not able to do justice in the case without taking an account between Maspons and Demestre Chia or their representatives, and, not seeing how to do this, he entered judgment for the defendants. That difficulty was got over in the Court of Appeal, which, by the order now appealed against, directs such an account to be taken. If their order was in other respects right, it is not appealed against, because of their ordering that account to be taken, which indeed seems to have been done at the instance of the defendants, now appellants.

It is somewhat singular that neither the learned Judges below, nor the very able counsel who argued below and at your Lordships' bar, seem to have remembered that for the last sixty years the subject with which we are now dealing has been regulated by statute. Yet it is so. The first of what are commonly called the Factors Acts, 4 Geo. 4. c. 83 (which received the royal assent on the 18th of July, 1823), dealt entirely with the subject of consignees. It was re-enacted, with some slight alterations, in the 1st section of 6 Geo. 4. c. 94 (royal assent 5th of July, 1825), of which I will read so much as bears on the present case, "From and after the passing of this Act (5th of July, 1825) any person or persons intrusted for the purpose of consignment or of sale with any goods, and who shall have shipped them in his own name, shall be deemed and taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money, &c., advanced by such consignee to or for the use of the person in whose name such goods shall be shipped, or on any money, &c., received by him to the use of such consignee in the like manner, to all intents and purposes, as if such persons were the true owners of such goods, provided such consignee shall not have *notice by the bill of lading or otherwise*, at or before the time of such advance of money, &c., or of such receipt of money, &c., in respect of which such lien is claimed, that such person so shipping in his own name is not the actual and *bona fide* owner of such goods."

That enactment has never been altered, and its provisions have, in practice, been found to work so harmoniously with the practice of merchants that I am not aware that any case has ever arisen requiring a Court of law to construe it, which probably is the reason why an Act of such importance is not familiar to every one; but so it is, that it was only almost at the end of the argument at your bar that a member of this House recollected this Act and asked if it did not affect the question. Lord Tenterden's abstract of these two Acts is quoted in *Cole* v. *The North Western Bank* (22). This statute renders it unnecessary to consider the decisions previous to that enactment, most of which are cited in the judgment of the Court of Appeal. I may say, however, that I think that the enacting part merely confirms what had been previously decided, and what the Court of Appeal have (without having their attention called to the statute) again decided to be the law. The proviso may, however, have the effect of extending the rights of consignees. For I take it that the common law was, that knowledge, however obtained, that the goods were not the property of the person dealing as a principal, prevented the advancer from having a lien for the advances made after such knowledge, on the ground that it was unjust, with knowledge, to take one man's goods to pay another's debt.

Those who promoted the Factors Acts thought that this principle ought to be modified for the convenience of commerce.

It is said (*Paley on Agency*, by Lloyd, p. 226), and, though I do not know how it was, it is probable, that in the bill which afterwards became 4 Geo. 4. c. 83, as it was introduced, the proviso was that the consignee should not have notice *by the bill of lading*, and that Lord Eldon in committee added the important words *or otherwise*. Still it is *notice*, and not merely knowledge; and notice and knowledge are not necessarily the same. The fourth question was not framed with this distinction in view.

I should be unwilling, without more consideration, to decide either way, whe-

(22) 44 Law J. Rep. C.P. 233; Law Rep. 10 C.P. 354, 360.

ther knowledge, however acquired, did or did not deprive the consignee of his rights of lien for advances made subsequent to the acquiring of that knowledge; and it is unnecessary to decide that question now, for notice undoubtedly does so deprive him. In the present case the knowledge was conveyed by the two letters I have read, enclosing the one the charter-party, and the other the invoice and the bills of lading. And I think knowledge conveyed by the consignor to the consignee in such letters is notice.

It is not necessary that there should be notice of the name of the person who has an interest, but only that there is a person having such an interest, or, as in the Spanish letter he is called, an *interesado*. That is enough to give the consignee notice that the consignor is not the actual and *bona fide* owner of such goods, or rather of the whole interest in such goods. But so far as the consignor has an interest by way of lien or otherwise paramount to that of the *interesado*, he is the actual owner, and the consignee has his lien. The order appealed against is therefore, I think, right as far as the merits go.

I will now proceed to make a few remarks on what I may call the technical points. The plaintiffs in their statement of claim say:—"The plaintiffs claim, first, 11,000*l.* with interest, until payment; secondly, a declaration that the said sum of 11,000*l.* is the money of the plaintiffs as against the defendants; and thirdly, such further and other relief as the nature of the case may require."

This seems to me to be exactly what would have been more briefly stated on the old system of pleading under a count for "money had and received to the use of the plaintiffs." The first eighteen paragraphs of the statement of defence amount to saying that the money was not had and received to the use of the plaintiffs, but to the use of the defendants and other persons who had a lien paramount to the plaintiffs. That would, under the old system of pleading, have amounted to the general issue; and under it the defendants could have raised the whole question decided on what I have called the merits. It was, I think, at your Lordships' bar, contended that the plaintiffs could not have maintained money had and received, even if there had been no lien at all—as suppose that the balance between the plaintiffs and Demestre Chia had been in favour of the plaintiffs, and the balance as between the defendants and Demestre Chia had been in favour of Demestre Chia, still it was said that money had and received would not have lain, for the defendants received the money to the use of Demestre Chia exclusively. Had their relation to them been that of servant to master, as in *Stephens* v. *Badcock* (23) that would have been so. I am not able to understand how that could be maintained after the answer of the jury to the sixth and eighth questions.

By the 19th and 20th paragraphs of the statement of defence it is alleged: "19. The city of Havannah, where the plaintiffs are carrying on business, is in the island of Cuba, a colony of Spain, and governed by the law of Spain, and the plaintiffs and their factors and agents, the said Demestre Chia & Co., who also carry on business in Havannah aforesaid, conducted all the business relating to the shipment of the said cargo of tobacco to the defendants in Havannah aforesaid, and subject to the said law of Spain." "20. By the law of Spain, whenever an agent deals in his own name with the business entrusted to him by his principal, a third person with whom such agent contracts *is bound to consider the agent as a principal entitled to deal with the subject-matter of the contract as his own property*, and the principal of such agent has no right of action against the third person, unless the principal obtains an assignment from the agent, and the third person so contracting with the agent as aforesaid has no right of action against the principal. It was under this law of Spain that the defendants, who have had long experience in commerce with Spain and her colonies, accepted the consignment of the said cargo."

No evidence whatever was given of that part of the allegation as to the law of Spain which I have marked in italics and read with emphasis. The portions

(23) 3 B. & Ad. 354; 1 Law J. Rep. K.B. 75

of the Spanish Code cited seem to me to go far to shew that the law of Spain does differ from the law of England to some extent. Article 119 of the Spanish Code seems to shew that the law of Spain does not establish privity of contract between a principal and those with whom his agent has made a contract to the same extent as the law of England. But the plaintiff's case in no respect depended on the existence of any privity of contract between the plaintiffs, as principals of Demestre Chia, and the defendants. They had a right, so long as the goods remained in specie, a right consequent on their property, to demand and take their goods from Mildred & Co., on satisfying whatever lien paramount to their right there was on the goods; this depended not on agency, nor on privity of contract, but upon property. And the defendants having effected the insurance for the benefit of all whom it concerned, they had the same right to demand the insurance money that they would have had to demand the goods. They must satisfy every lien on the policy paramount to their own, but after doing so are entitled to the surplus.

It was contemplated by Maspons and Demestre that the tobacco was to be sold and the proceeds were to be remitted. Had this been done, questions might have arisen for the solution of which it might have been necessary to consider whether there was privity of contract, and to discuss the doctrines laid down in the cases cited in the judgment of the Court of Appeal. Should any such questions arise in some other case, the reasoning in the judgment will be well worthy of consideration. But the goods perished at sea, when the only thing done had been to effect the insurance. With great respect to Lord Justice Lindley, I will not follow him in discussing questions which do not arise.

I think, therefore, that the order appealed against should be affirmed, and the appeal dismissed with costs.

The Lord Chancellor (Earl of Selborne).—I agree generally both with the conclusion and with the reasons of my noble and learned friend.

The fact that the appellants had notice of the respondents' interest before they had done anything for valuable consideration on the footing and faith of the property in this insurance belonging to Demestre Chia & Co., so that their general lien against that firm could attach upon it, is enough, in my opinion, to decide this case.

There is one observation of my noble and learned friend as to possible distinctions between "notice" and "knowledge," as to which I should desire to reserve the expression of any opinion on my own part until some case arises in which the question whether actual knowledge is or is not notice may become material.

Lord FitzGerald.—The very elaborate judgment which has just been delivered by my noble and learned friend (Lord Blackburn) exhibits another instance of the great care which he gives to all cases coming before your Lordships' House, but especially where any important question of mercantile law is involved.

I concur in the conclusion at which he has arrived.

There were but two questions in the cause when the facts came to be properly understood, though some others were very elaborately discussed both in the Court of Appeal and here. The first question was as to whether the plaintiffs could in their own names maintain any action against the defendants—for the present I pass that question by.

The second question was as to the extent of the defendants' lien, which went to the whole merits of the action. That the defendants had a lien for their outlay and commission in respect of the policies of insurance was not disputed.

Lord Justice Lindley, in delivering the judgment of the Court of Appeal, says, with accuracy, that this question of lien must be determined by English law, and depends on a question of fact—namely, whether the defendants knew before their alleged lien accrued that Demestre & Co. were acting for a principal whose name was not disclosed. I think this is correct, whether the rights of the parties are to be determined by the Factors Act, or by analogy to it, or at common law.

On this question of fact there is no opening for any doubt. The lien, if any, of

Mildred v. *Maspons y Hermano, H.L.*

the defendants never attached, speaking accurately, on the cargo of the *Bachi*; for they never had possession, or the right to the possession, of the cargo, or made any advances on it. Both ship and cargo had perished before the bill of lading and other shipping documents reached the defendants, and before any insurance had been effected. Assuming that the policies represented the cargo, they were not effected until the 18th of August, 1880, and before that day the defendants had received Demestre Chia & Co.'s letter of the 24th of July, 1880, in which occur the passages, "the *interesado* has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi*," —and "The cargo, in order to please the *interesado*, we will insure here with the 'Lloyd Habanero'." We have thus a clear intimation to the defendants that there was a party interested, and such party is described as the "*interesado*" making the shipment, and at whose desire it had been intended to effect the insurances with the "Lloyd Habanero." The notice to the defendants is in effect that there is a third party, who apparently had the whole interest in and control over the cargo.

The Factors Act, s. 1, deals with the apparent ownership of goods, and provides that for certain purposes and under certain circumstances the apparent owner shall be deemed to be the true owner, so as to entitle his consignee to a lien for advances, but notice to the consignee deprives him of the statutable protection. It may be open to argument and consideration whether that enactment directly embraces, or is applicable otherwise than by analogy to the case before us; but it being quite clear that the defendants had notice that Demestre & Co. were not the actual and *bona fide* owners of the cargo, the defendants can have no benefit from the statute; and if they claim their alleged lien on the proceeds of the policy at common law, the notice equally excludes that lien.

On the question as to whether the plaintiffs had a right to intervene, and in their own names sue the defendants for the money received on foot of the policies of insurance, I think there never was an opening for doubt. The defendants, having notice of the *interesado*, effect the policies "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all, do make assurance, and causeth themselves and them and every of them to be assured." Prior to the effecting of these insurances they had received the invoice of the goods headed thus: "Invoice of the following goods shipped by us on board the Spanish brigantine *Bachi*, Captain Uribe, for Gibraltar, and consigned to Messrs. Mildred, Goyeneche & Co., London, for account and risk of whom it might concern." Before the receipt of any part of the insurance moneys, the defendants had notice that the plaintiffs were the *interesado*; and if the plaintiffs are entitled to recover any part of the proceeds, as your Lordships hold that they are, then the money so received by the defendants is money had and received by the defendants for the use of the plaintiffs, and which in justice and good conscience they ought to pay over; and an action lies at the suit of the plaintiffs to recover it.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors—Freshfield & Williams, for appellants; Waltons, Bubb & Walton, for respondents.

1883. Nov. 23. } SHELLEY (*appellant*) *v.* BETHELL (*respondent*).

Stage Plays—Theatres Regulation Act (6 & 7 Vict. c. 68), s. 2—Place of Public Resort—Public Performance in Private Theatre.

[For the report of the above case, see 53 Law J. Rep. M.C. 16.]

[IN THE COURT OF APPEAL.]

1883. June 30. } HOWARD v. MAITLAND.*

Vendor and Purchaser—Covenants for Quiet Enjoyment and Title—Disturbance—Right of Common over Waste Lands—Decree establishing Right.

The defendant sold certain waste land to the plaintiff. The conveyance contained a covenant for title, and also one for quiet enjoyment, "notwithstanding any act or thing done or suffered by the defendant, or by any of his predecessors in title." Subsequently a decree was made in a suit in equity, to which the plaintiff was not a party, although representing one of a class of persons who were defendants in that suit, by which it was declared that the land so conveyed was subject to a general right of common over it:—Held, *that the decree, in the absence of any entry or other act, was not a disturbance of the plaintiff's right of possession so as to constitute a breach of the covenant for quiet possession.* Held *also, that a grant of such right of common by some predecessor in title of the defendant would not be inferred in the absence of evidence of such a grant, and that consequently there was no breach of the covenant for title.*

Appeal by the defendant from a judgment of Day, J.

The defendant, who was lord of the manor of Loughton, in 1864 sold to the plaintiff about ten acres of waste land of the manor in the Forest of Epping. The deed of conveyance contained the following covenants on the part of the defendant:—

"The said John Whitaker Maitland doth hereby, for himself, his heirs, executors and administrators, covenant with the said Samuel Lloyd Howard, his heirs, appointees and assigns, that, notwithstanding any act or thing by the said John Whitaker Maitland, or any of his ancestors or predecessors in title, made, done or executed or knowingly suffered, he the said John Whitaker Maitland now hath in himself good right and full power to grant and convey the said piece of land to the uses and in manner and subject as aforesaid: And that, notwithstanding any such act or thing as aforesaid, the same piece of land shall at all times hereafter remain and be to the uses and subject as aforesaid, and be quietly entered into and upon, and held, occupied and enjoyed, and the rents and profits thereof received and taken, by the said Samuel Lloyd Howard, his heirs, appointees and assigns accordingly, without any lawful interruption or disturbance by him the said John Whitaker Maitland, or his heirs, or any person lawfully or equitably claiming by, from, under or in trust for him, them or any of them, or any of his ancestors or predecessors, and that free and discharged or otherwise by the said John Whitaker Maitland, his heirs, executors or administrators, sufficiently indemnified from and against all estate, incumbrances, claims and demands whatsoever, either already or hereafter to be made, occasioned or suffered by the said John Whitaker Maitland or his heirs, or any person lawfully or equitably claiming by, from, under or in trust for him, them, or any of them, or any of his ancestors or predecessors."

In 1878 the Epping Forest Act (41 & 42 Vict c. ccxiii.) was passed, in consequence of a decree made by the Court of Chancery in the case of *The Commissioners of Sewers* v. *Glasse* (1), decided in 1874, to the effect that the owners and occupiers of lands within Epping Forest other than waste lands were entitled to have certain rights of common over all the waste lands within the forest. The Epping Forest Act settled, amongst other things, the amount of compensation to be paid by the Corporation of London for lands thrown open by them in accordance with the above-mentioned decision.

The plaintiff attended before the arbitrator appointed under the Act, and an award was made to the effect that the plaintiff, on payment of the sum of 23*l.* 2*s.* 1*d.* to the Conservators of Epping Forest, should retain part of the land containing 1r. 17p., and be quieted in title and released from all rights of common over the same; and that the remaining part of the land, containing 9a. 1r. 7p.

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

(1) 44 Law J. Rep. Chanc. 129: Law Rep. 19 Eq. 134.

should be thrown open, upon payment by the Conservators to the plaintiff of the sum of 674*l.* for his interest therein. It was also alleged by the plaintiff that the sum of 674*l.* included compensation for the value of the land with the Crown rights, and also the improvements made by the plaintiff upon the land.

The plaintiff sought to recover damages for breach of the defendant's covenant for title and quiet enjoyment, upon the ground that the defendant had not full right and power to grant and convey the land in question by reason of the existence of the rights of common, which rights were due to some act done or knowingly suffered by the defendant's predecessor in title.

At the trial of the action before Day, J., without a jury, the learned Judge gave judgment for the plaintiff, holding that the right of commonage if exercised would have been a breach of the covenant for quiet enjoyment; and that the decree made in the case of *The Commissioners of Sewers* v. *Glasse* (1) was a breach of the covenant for quiet enjoyment; but no opinion was expressed whether there had been any breach of the covenant for title.

The defendant appealed.

Rigby, Q.C., and *Finlay, Q.C.* (with them *Mansel Jones*), for the defendant.—The decree in *The Commissioners of Sewers* v. *Glasse* (1), although establishing a right of commonage as against the plaintiff, did not operate *per se* as a disturbance of his occupation. The decree, unless enforced, would not amount to a disturbance of the plaintiff's right; in the absence of evidence that it was enforced, there is no evidence of any breach of the covenant for quiet enjoyment. Although the plaintiff was not a party to the proceedings in *The Commissioners of Sewers* v. *Glasse* (1), yet he is bound by the decree —*The Commissioners of Sewers* v. *Gellatly* (2). In *Sugden's Vendor and Purchaser* (3) it is said that "a covenant for quiet enjoyment against A, and any other person by his means, title or procurement, is broken by entry of a person in whose name A purchased jointly with his own name"; but here there was no disturbance by or through the means of the defendant or his predecessor in title—*Butler* v. *Swinnerton* (4). Again, in *Dart on Vendors* (5) it is stated "that the common covenant for quiet enjoyment is broken by a suit in equity, although equitable disturbances be not specified." That may be so; but the injunction is recited in the Epping Forest Act, and it is admitted by the plaintiff that independently of that Act there has been no disturbance. Moreover, the covenant for quiet possession is not broken until some entry or other disturbance has been made upon the title of the person who has the title—*Sheppard's Touchstone* (6). There is no breach of the covenant where the proceeding in equity interferes only with a particular mode of enjoyment of the land or part of it, but not with the title or possession—*Rawle on Covenants for Title* (7), citing *Hunt* v. *Danvers* (8) and *Morgan* v. *Hunt* (9). The case of *Hunt* v. *Danvers* (8) turned upon the question whether the Court would take notice of a decree made against one of the parties. *Child* v. *Stenning* (10) was also referred to.

H. Matthews, Q.C., and *R. T. Reid, Q.C.*, for the plaintiff.—The decree made in the case of *The Commissioners of Sewers* v. *Glasse* (1) was a disturbance of the plaintiff's right to quiet enjoyment within the meaning of the covenant; and the plaintiff was bound by that decree—*The Commissioners of Sewers* v. *Gellatly* (2). It dealt with all the open land within the ambit of Epping Forest. The plaintiff was liable to be interfered with, so far as his possession was concerned; and that liability is recognised by the statute, which recites the proceedings taken in the suit in equity.

Rigby, Q.C., was not called upon to reply.

BRETT, M.R.—The questions which we have to decide are whether there have been any breaches of the covenants for

(2) 45 Law J. Rep. Chanc. 788; Law Rep. 2 Ch. D. 610.
(3) 14th ed. p. 601.
(4) Cro. Jac. 656; Palm. 339.
(5) 5th ed. vol. ii. p. 782.
(6) At p. 171.
(7) 4th ed. at p. 143 (Amer.).
(8) Sir T. Raym. 370, 371.
(9) 2 Vent. 213, 215.
(10) 48 Law J. Rep. Chanc. 392; Law Rep. 11 Ch. D. 82.

quiet enjoyment and for title. With regard to the question whether there has been any breach of the covenant for quiet enjoyment, it appears that the plaintiff purchased from the defendant and entered into possession of the land in question, which possession was not interfered with until the making of the award under the Epping Forest Act. He received compensation for being so disturbed in accordance with the terms of the statute, the land being purchased as land subject to a commonable right over it which might be exercised by other persons; and the question is, whether he was disturbed in his possession of and property in the land, which it was assumed had been conveyed to him, but which was not subject to this right. Prior to the making of the award, no act had in fact been done by any person who assumed to exercise a commonable right over the land. The decree made in the case of *The Commissioners of Sewers* v. *Glasse* (1) was not against the plaintiff personally; but it would no doubt affect him to some extent, and would prevent him saying that there were no commonable rights over lands which were not inclosed in 1851. But his rights within his own land could not have been interfered with under that decree unless something further had been done. It therefore seems to me that the decree in question was not a disturbance of the plaintiff's right of possession and enjoyment of the property under the covenant for quiet enjoyment. No doubt the plaintiff would have had no defence to an action brought against him after the decree had been made for interfering with the right of common; but I am not prepared to say that, even if judgment had been recovered against him, that would have been a disturbance within the meaning of the covenant for quiet enjoyment. It is not, however, necessary, in the absence of any such judgment, to determine that question. Adopting the language laid down in *Sheppard's Touchstone* (6), it seems to me that there was no entry or actual disturbance, even if the decree had been such a disturbance, which would entitle the plaintiff to maintain an action upon the covenant for quiet enjoyment. The disturbance under the statute was not a disturbance against which the defendant covenanted within the meaning of that covenant.

As regards the question whether there has been any breach of the covenant for title, it seems to me that there is not any evidence of a grant of the commonable rights by any predecessor in title of the defendant, unless it could be said that the grant must of necessity have been made by such predecessor. It is impossible to say that. And, moreover, there is another reason against such a contention, for it was not the intention of either party to this covenant that the defendant was to covenant against any act which was a presumption of law. I am therefore of opinion that our judgment upon both questions must be for the defendant.

LINDLEY, L.J.—I am of the same opinion. The plaintiff must shew that the defendant, by reason of some act or thing done or suffered by the defendant or his predecessors in title, had no title to grant the land in order to recover in an action for breach of the covenant for title. No evidence has been given by the plaintiff that the defendant or his predecessors did so act, but we are asked to infer that from the fact, which has been admitted, that rights of inter-commonage over the land had at some time or other been acquired. I am unable to assume that, and it is doubtful whether either of the parties ever intended that the covenant should extend to rights acquired in the way suggested. It seems to me that there is no evidence of any breach of the covenant for title. The words of the covenant for quiet enjoyment —namely, "notwithstanding any such act or thing as aforesaid," which refer to "the acts or things done by the defendant or any of his predecessors," mentioned in the covenant for title—have also a material bearing on the question in respect of the covenant for quiet enjoyment, even if there had been any disturbance. It seems to me that there has been no disturbance in fact, such as was contemplated by the parties, within the meaning of the covenant; and that would be an answer to an action for breach of the covenant. It was further said that the decree made in the case of *The Commissioners of Sewers* v. *Glasse* (1) was a disturbance, inasmuch as

Howard v. *Maitland, App.*

the plaintiff, although no party to the action, could not dispute the existence of the rights of common; but no authority has been cited which says that it is. The plaintiff has therefore failed upon both questions.

FRY, L.J.—I am of the same opinion. With regard to the covenant for quiet enjoyment, the plaintiff was not disturbed in his possession until the passing of the Epping Forest Act. Moreover, the covenant was limited to acts done by the defendant or any of his predecessors in title; but there is no evidence to shew that the right of common was granted, if granted at all, by the defendant or by any of his predecessors in title.

It is extremely doubtful as regards the covenant for title whether the existence of a right of common over land, in respect of which the right might have existed at the time when it was conveyed to the plaintiff, would operate as a breach of the covenant. Even if the right did exist, there is no evidence to shew that that right was, within the meaning of the covenant, created by any act of the defendant or of any of his predecessors in title.

Appeal allowed.

Solicitors—K. R. Fletcher, for plaintiff; Druces, Jackson & Attlee, for defendant.

1883. June 12. July 10.

THE GUARDIANS OF THE PARISH OF MARYLEBONE (*appellants*) *v.* THE GUARDIANS OF THE UNION OF WYCOMBE (*respondents*).

Poor—Derivative Settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

[For the report of the above case, see 53 Law J. Rep. M.C. 12.]

1883. Nov. 20.

HESKE *v.* SAMUELSON AND COMPANY.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1. *sub-s.* 1—*Personal Injuries to Workman—"Defect" in "condition" of Machinery—Improper use of "Lift."*

The Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *which gives a right of action to a workman for personal injuries caused to him by reason of any "defect in the condition" of "the machinery or plant connected with or used in the business of the employer," applies to a machine which, though perfect as far as itself is concerned, is unfit for the purpose for which it is used.*

The deceased was engaged as a workman at the foot of a blasting furnace some eighty-five feet high, and it was part of his duty to fill barrows with coke and to wheel them on to a platform. Whilst the coke was being raised by means of a lift to the edge of the furnace, a large piece fell from the lift, which was not fenced at the side, upon the deceased, who was standing on the platform below in the performance of his duties, and killed him:—Held, *that there was a "defect in the condition" of the lift within the meaning of* 43 & 44 *Vict. c.* 42. *s.* 1. *sub-s.* 1.

Motion by way of appeal from the decision of the County Court Judge for Middlesborough.

The action was brought, under the provisions of Lord Campbell's Act, for the benefit of the widow and family of a workman whose death resulted, as was alleged, from a defect in the condition of certain machinery used in the business of his employers (the defendants). It appeared at the trial that the deceased, whilst engaged in the performance of his duties as a workman at the foot of a blast furnace some eighty-five feet high, belonging to the defendants, was killed by a large piece of coke which fell from the top of a lift upon his head. This lift was used to raise coke to the top of the furnace above the ground, and consisted of two platforms, which were made to ascend and descend alternately by means of machinery at the top, and it was the duty of the deceased to fill barrows

with coke and wheel them on to the platform after removing the empty barrows. The sides of the lift were not fenced so as to prevent coke from falling over.

The Judge held that a defect arising from the original condition of the machine was not a defect in the condition of the machinery within 43 & 44 Vict. c. 42. s. 1 (1), and gave judgment for the defendants. A rule *nisi* was afterwards obtained to set aside the judgment and for a new trial on the ground of misdirection.

R. V. Williams, for the defendants.—The judgment of the County Court Judge was correct. There was "no defect in the condition" of the machine within the meaning of 43 & 44 Vict. c. 42. The condition of a thing signifies its state and condition in itself; a machine, perfect as far as itself was concerned, cannot be said to be out of condition because it happens to be applied to a purpose for which it is not well adapted.

J. V. Austin, for the plaintiff, was not called upon to argue.

LORD COLERIDGE, C.J. — Though I have listened attentively to the ingenious argument of Mr. Williams, I feel no doubt at all as to what my decision ought to be in this case. The question before us is whether the County Court Judge was right in holding, under the circumstances disclosed before him, that there was no defect in the condition of the machine. I am of opinion that the decision was wrong, and that the judgment must accordingly be set aside. The accident in question arose from a part of the plant used being unfit for its purpose, and, that being so, it has arisen from the defective condition of that part of the plant. The condition of the plant was imperfect, considering the purpose for which it was used. That being so, it seems to me that there was a defect in its condition within the meaning of the statute.

STEPHEN, J.—I am of the same opinion. Mr. Williams's argument seems to me to come to this: that if an employer uses a machine part of which is too weak for the purpose for which it was used, that constitutes a defect in the condition of the machine; but that if the machine was wholly unfit for the purpose for which it was used, then there is no defect. I cannot assent to such a proposition as that. It seems to me that if a man, for instance, uses a windlass which was only fit to raise water from a well for the purpose of raising a much heavier weight, such as coals from a colliery, and for which the windlass was itself inadequate, he uses a machine which is defective in its condition so far as regards the purpose for which it is used, and falls within section 1, sub-section 1, of the Employers' Liability Act.

Rule absolute for new trial. Leave to appeal refused.

(1) By 43 & 44 Vict. c. 42. s. 1, it is enacted that where "personal injury is caused to a workman, by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer, ... the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedy against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

By section 2: "A workman shall not be entitled under this Act to any right of compensation or remedy against the employer . . . . unless the defect . . . . arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the . . . machinery or plant were in proper condition."

Solicitors—E. T. Lewis, for plaintiff; Van Sandau, Cumming & Co., agents for Belk, Middlesborough, for defendants.

[IN THE COURT OF APPEAL.]

1883. Nov. 22, 24. } STOTT *v.* FAIRLAMB.*

Promissory Note payable on Demand—Consideration—Agreement to pay Money within Three Years—Substitution of Note for—Debt in præsenti payable in futuro.

Upon a dissolution of partnership an agreement was entered into which provided that the defendant, one of the partners, should pay the other partner a sum of 2,000*l. within three years of the date of the agreement, with interest on the same, or on the instalments thereof for the time being unpaid, computed from the date of the dissolution of partnership. Subsequently the defendant gave to the other partner, at his request, a promissory note payable on demand for the same sum and bearing the same interest. In an action on this note by the executrix of the payee,*— Held, *that the plaintiff was entitled to recover, as there was good consideration for the promissory note, for that where there is a debt existing in præsenti, but payable within a period of time and not on a fixed day in futuro, so that the debtor is entitled to pay the sum owed at any time at his option, there is good consideration for a promissory note payable on demand given by the debtor and accepted by the creditor for the amount of that debt; and that such a case falls within the principle of the decision of the Exchequer Chamber in* Currie *v.* Misa (44 Law J. Rep. Exch. 94).

Appeal from the judgment of Denman, J., in favour of the defendant, given on further consideration.

The case is reported 52 Law J. Rep. Q.B. 420.

Action by the plaintiff, as executrix of her husband Stott, on a promissory note, dated the 31st of July, 1881, whereby the defendant promised to pay Stott, or order, on demand, 2,000*l.*, with interest at five per cent.

It appeared that in August, 1880, the testator Stott had entered into partnership with the defendant; and that on the 31st of July, 1881, terms of dissolution of partnership were settled, which were embodied in an agreement dated the 8th of August, 1881.

This agreement recited the partnership, the payment by Stott into the business of 2,000*l.*, that "there was then due and owing to Stott the sum of 2,000*l.*"; and it was agreed that Stott should retire as from the 31st of July, that the defendant should pay to Stott 2,000*l.* within three years of the date thereof, with interest at five per cent. on the same, or on the instalments thereof for the time being remaining unpaid, computed from the 31st of July, and indemnify Stott against the debts of the partnership; that Stott should accept the sum of 2,000*l.* in satisfaction of all his share in the stock, credits and effects of the partnership, and that a proper deed should be executed to carry the agreement into effect.

After this agreement was signed, Stott called on the defendant and told her that he wanted something to shew his own people; that they were not satisfied with the agreement, and wanted a promissory note. Upon the defendant saying, "What if anything should happen to you?" he promised to send a letter to the effect that the note should not be put in force until the three years mentioned in the agreement should have expired; whereupon the defendant gave him the note, which, though given in September, was dated on the 31st of July.

The defendant alleged that there was no consideration for the note, inasmuch as it was given in respect of the sum of 2,000*l.* payable under the agreement of August, 1881, and further alleged that it was given to and accepted by Stott, subject to the conditions contained in the agreement of August, 1881, and that it was not payable until the expiration of three years from the 8th of August, 1881; and the jury found that this part of the defence was proved.

Denman, J., on further consideration, gave judgment for the defendant, on the ground that there was no consideration for the note.

The plaintiff appealed.

Wills, Q.C., and *C. Dodd*, for the appellant.—The plaintiff is entitled to recover

Coram Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

upon this promissory note, because the circumstances of the case shew that there was good consideration for the note: there was an antecedent debt or liability, and such a debt or liability is stated by 45 & 46 Vict. c. 61. s. 27, to be a valuable consideration whether the bill or note is payable on demand or at a future time, and that statute does not in this respect alter the old law. The subject of consideration is dealt with in *Currie* v. *Misa* (1) in the judgment of the Court of Exchequer Chamber. If the defendant had given the plaintiff cash, that would have been a good payment; and if a promissory note is given, that is equivalent to payment, for it is a valid transaction within the principle laid down in *Currie* v. *Misa* (1).

If there are circumstances which would make the payment of cash natural, or which make the payment, not a voluntary gift, but the discharge of an obligation, then there is consideration, and the giving the note is conditional payment. The giving the note altered the position of the plaintiff, as the Statute of Limitations would begin to run at a different date; the note when given became the instrument in force, and at the end of the three years any action brought would have to be brought upon it.

A collateral agreement to suspend the payment of the note cannot be admitted to contradict the note—*Abrey* v. *Crux* (2). *Swift* v. *Tyson* (3) and *The Leeds Bank* v. *Walker* (4) were also cited.

Waddy, Q.C., and *E. Wilberforce*, for the defendant.—There was no consideration for this note. The plaintiff gave nothing, and the defendant got nothing. Whether the Statute of Limitations would begin to run at a different date depends upon whether the promissory note was or was not given in substitution of the agreement.

[BOWEN, L.J.—Had not the debtor here a right to pay at any moment?]

That does not appear upon the agreement, and it is open to the defendant to shew that the giving the note was not the exercise of an election to pay the money at that time. If there are two inconsistent documents, and it is uncertain which ought to prevail, the intention of the parties must be looked at, so that the defendant can in this case shew that she did not intend to vary the original agreement.

This case is not affected by 45 & 46 Vict. c. 61, for it was made before that Act was passed; but that statute does not alter the law, and an antecedent debt differs from an antecedent liability, so that this case does not fall within the principle of the decision in *Currie* v. *Misa* (1).

BRETT, M.R.—In this case there was a deed of dissolution of partnership, by which the defendant was bound to pay to the plaintiff a sum of 2,000*l.* within the time specified in the deed, and was also bound to pay interest at five per cent.; the stipulation was that the money was to be paid, not on a specified day, but within a period of three years. These being the facts, the defendant gave a promissory note payable on demand—and the evidence shews, as it seems to me, that it was given as a promissory note and not as an escrow—and on this note this action is brought. For the defendant it is contended that there was no consideration for the note. The case was argued thus—that if the agreement made is considered, there was then a debt of 2,000*l.*, a then existing debt, but a debt payable at a future time, in the sense that it could only be paid on a fixed day; and the question on this state of facts is, whether where there is a debt existing *in præsenti* but payable on a fixed day *in futuro*, then, if a promissory note be given for that debt, can it be said that there is value for that note?

It is then said, further, that that supposed case is not this case, but that here there was a debt existing *in præsenti*, but a debt to be paid by the debtor within a certain time, and not only on a fixed day; so that the debtor could, at her option, pay the debt at any date within that time, and relieve herself from the liability to pay interest—so that the debtor was, in fact, entitled to pay the money at any time; and it is urged that when she gave the promissory note she exercised a right given

(1) 44 Law J. Rep. Exch. 94; Law Rep. 10 Exch. 153.
(2) 39 Law J. Rep. C.P. 9; Law Rep. 5 C.P. 37.
(3) 16 Peters, 1.
(4) 52 Law J. Rep. Q.B. 590.

to her by the contract of agreement of paying the money within the time, and so of relieving herself from the payment of future interest; and, further, that the payment was a conditional payment only in the sense that if she failed to pay the note on demand, the right under the deed would revive.

It is said, on the other side, that neither of these two suggested cases comes within the decision of the Exchequer Chamber in *Currie* v. *Misa* (1). If that be true, then we should be at liberty to say that there was in this case no consideration; but if the second of the suggested cases does fall within the principle of *Currie* v. *Misa* (1), then we are bound by that case.

Suppose that there is a debt existing *in præsenti* but payable *in futuro* on a fixed day, it is at least doubtful whether that state of facts would supply consideration for giving a promissory note. It is not necessary to decide that; and, assuming that it would not, we then turn to the second suggested case, which embraces the facts of this case. The debt being then a debt existing *in præsenti* but payable by the debtor within a period of time, and not only on a fixed day *in futuro*, the moment the promissory note payable on demand was given the debtor was entitled to pay off the money and to relieve herself from all liability.

In the case of *Currie* v. *Misa* (1), there was a debt existing payable at the moment the cheque was given, so that there was a debt existing and payable *in præsenti*, and for that reason *Currie* v. *Misa* (1) does not necessarily decide this case; but that judgment lays down a principle that, where there is a state of things which entitles a debtor to pay the sum owed, the giving a promissory note, intended to be an effective note, and where this note is accepted by the creditor in respect of that right, such a note is payment conditional on the note being met, and that in such a case there is sufficient consideration to support the promissory note and to enable the person to whom it is given to sue upon it.

It was said on behalf of the plaintiff that where there are circumstances which would make the payment of the money natural, in such a case the giving a promissory note is conditional payment, and then that there is consideration for the note given. We cannot adopt that proposition in those terms; but we hold that, where there is a state of things which entitles a debtor to make payment at once, and he gives a note payable at once, the result in law is that there is a conditional payment, and that there is consideration for the note so given.

It has been said that the Bills of Exchange Act, 45 & 46 Vict. c. 61, would lead us to this conclusion; but it was said by the defendant that that statute does not apply to this case, as the transaction now before us took place before that Act was passed. I, however, decide this case, not upon that statute, but upon the law as it existed before that statute was passed, and the result is that, in a difficult case and one the decision of which is somewhat nice, I think that the appeal must be allowed and judgment entered for the plaintiff.

BAGGALLAY, L.J.—I also think that there was in this case sufficient consideration for this note. I decide this on the special circumstances of the case, and mainly on the fact that the obligation incurred by the defendant was to pay a sum of money within three years. She could pay that sum at an earlier period and it was open to her to pay off the amount when the note was given, so that she could make a conditional payment if the other party to the transaction would accept it; and if that be so, then the facts of this case bring it within the principle of *Currie* v. *Misa* (1).

BOWEN, L.J.—There was in this case an agreement that the defendant would pay a sum of money within three years, but she had a right to elect to pay earlier than at the end of the time named; that being so, the deed effected a postponement of payment, subject to an option given to the defendant to pay earlier. She then gave a promissory note payable on demand. It seems clear that this promissory note was intended to have some effect, and some legal effect—it was a note which could be enforced on demand, otherwise it was no use

giving it. Mr. Justice Denman says in his judgment, "After the agreement of the 8th of August was signed, Stott called on the defendant. He told her he wanted something to shew his own people; that they were not satisfied with the agreement, and wanted a promissory note." That means that the plaintiff wanted a document which would have a legal and obvious effect, and he obtained one; he obtained a promissory note payable on demand—and had he not done so his application to the defendant would have been fruitless. Then was there consideration at law for this note? I think *Currie* v. *Misa* (1) decides the point—not indeed in terms, for the case is not on all fours with this case, but the principle of that decision applies here. The debtor here had a right to pay the money within the three years, and in lieu of cash she gave a promissory note payable on demand, intending that it should have the effect in law, and except so far as she could rely on the honour of Stott, of an ordinary promissory note—that is to say, that it should in law be a conditional payment. We cannot go into any collateral agreement entered into between herself and Stott to control the operation of the note; and, on the facts disclosed in this case, we must, I think, hold that this case is, in principle, the same as *Currie* v. *Misa* (1), inasmuch as the giving the promissory note was in fact conditional payment.

Appeal allowed. Judgment for plaintiff.

Solicitors—Peace & Co., agents for Rhodes, Halifax, for plaintiff; Sykes, agents for Ramsden, Sykes & Ramsden, Huddersfield, for defendant.

[IN THE HOUSE OF LORDS.]

1883. Aug. 2, 3. Nov. 30. } DOBBS *v.* THE GRAND JUNCTION WATERWORKS COMPANY.

Waterworks Company — Water Rate, how calculated—"Annual Value."

A water company was required by a special Act of Parliament to supply water for houses in its district at certain rates "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district." A later Act altered the scale of rates and fixed them at a percentage on the "annual value." It also enacted that, except as expressly provided therein, "this Act shall not repeal, alter, interpret or in any manner affect" the provisions of the earlier Act:—Held, *that the provisions of the earlier Act, if and so far as they differed from those of the later Act, were abrogated and might be disregarded. That "annual value" in the later Act meant "net annual value," calculated in the same way as by law "rateable value" is required to be calculated for the purpose of assessing poor's rates.*

This was an appeal from a judgment of the Court of Appeal, which reversed one of the Queen's Bench Division. The case is reported 51 Law J. Rep. Q.B. 501; 52 ibid. 90; Law Rep. 9 Q.B. D. 151; 10 Q.B. D. 337.

The appellant occupied a house under a lease at a ground rent, which house was supplied with water by the respondents. In the poor's rate assessment the house was assessed as follows:—"Gross estimated rental, 140*l.*; net rateable value, 118*l.*" The appellant contended that the water rate was to be computed on the net value; the respondents claimed the right to charge upon the gross value.

The sections in the Company's Acts which prescribed the mode of estimating the water rates were, so far as material, as follows:—7 Geo. 4. c. cxl. s. 27, after setting out the amount of the rate according to a certain scale, continues, "and every such rate shall be payable according

to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated."

15 & 16 Vict. c. clvii. s. 46, prescribes a different scale of rates estimated at a percentage on the "annual value." The Act recites the previous Act, and by section 57 enacts that, "except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret or in any manner affect any of the provisions of the recited Acts or any of them in force at the commencement of this Act."

Davey, Q.C., and *Webster, Q.C.* (*Sutton* and *A. P. Poley* with them), for the appellant.—The 27th section of the Act of Geo. 4. is not repealed except so far as the scale of percentages is altered. The maximum and minimum charges are not repealed. There is no express repeal, and the provisions of the first Act are preserved by section 57—*Dwarris on Statutes* (1) and *Hawkins* v. *Gathercole* (2). Then what is the meaning of "the actual amount or annual value upon which the assessment to the poor's rate is computed"? The Court of Appeal have held that this means the gross value from which by deduction the rateable value is obtained. At the time when the Act of Geo. 4. was passed the only statute in force as to poor's rates was the Act of Elizabeth (43 Eliz. c. 2), which directed the rate to be made "according to the ability of the parish." Judicial decisions established the proper mode of rating—*The King* v. *Tomlinson* (3), *The King* v. *Lower Mitton* (4), *The King* v. *Lord Granville* (5) and *The King* v. *Adames* (6). The Parochial Assessments Act (6 & 7 Will. 4. c. 96) declared the law as laid down in those cases. "Assessment" means the fixing of the rate, and this is done upon the net value, the gross value being merely ascertained as a step in finding the net value.

If, however, it be held that the second Act repeals the first by substituting "annual value" as the basis of computation, it is contended that "annual value" has the same meaning of "net" value. In the first place, net value is in fact the real value of anything, gross value is not. Secondly, the rating decisions above quoted have in effect held that annual value means net value. Down to the passing of the Metropolis Valuation Act, 1869 (32 & 33 Vict. c. 67), gross value was never calculated at all except so far as was necessary in order to get net value.

The following statutes and cases were referred to—25 & 26 Vict. c. 103 (Union Assessments Act, 1862), ss. 14, 15; 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), ss. 161, 170; 55 Geo. 3. c. 51. s. 1; 8 & 9 Vict. c. 111. s. 6; 15 & 16 Vict. c. 81. s. 6; *Sheffield Waterworks Company* v. *Bennett* (7) and *Warrington Waterworks Company* v. *Longshaw* (8).

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Finlay, Q.C.* (*Clerk* with them), for the respondents.—The better view is that the Act of 1827 is repealed. That Act took rent as the basis; the other provisions were only in substitution where rent could not be ascertained. There is nothing to warrant the contention that any deduction could have been made for repairs where the landlord did them. Rent, therefore, gave an unequal result where it was taken as the basis. The same was true of the alternative given if it means "rateable value"; for in 1827 the rateable value might be altogether below the rent; the parish authorities could take any proportionate part of the rent to assess the rates upon (37 Geo. 3. c. 65), provided the assessment was equal. The Act of 1852 was intended to substitute a uniform standard. It is admitted that the new scale is to be used; but how can it be used except in relation to annual value? It cannot be disputed that the computation on the basis of actual rent is repealed; but

(1) 2nd ed. p. 532.
(2) 6 De Gex, M. & G. 1; 24 Law J. Rep. Chanc. 332.
(3) 9 B. & C. 163.
(4) 9 ibid. 810.
(5) 9 ibid. 188, 191.
(6) 4 B. & Ad. 61; 2 Law J. Rep. M.C. 90.
(7) 42 Law J. Rep. Exch. 121; Law Rep. 7 Exch. 409.
(8) 51 Law J. Rep. Q.B. 498; Law Rep. 9 Q.B. D. 145.

the latter part of section 27 is a mere alternative where the actual rent is unascertainable. The question, therefore, depends on the meaning of annual value in the Act of 1852. There is no abstract annual value; the words must be taken in relation to the person whose interest is valued. The value to the landlord is not to be considered in making a rate to be paid by the tenant. *Colvill* v. *Wood* (9) decided that the cost of repairs was not to be deducted in estimating the value of an occupier's interest as a vote qualification. The rating statutes use the word "net," and are no authority on the point—see Parochial Assessments Act. "Annual value" in that Act (section 3) does not mean the same as "net annual value" (section 1). It covers both "gross" and "net." By the Metropolis Valuation Act, 1869, s. 45, the inhabited house duty is to be levied on gross annual value.

If section 27 of the earlier Act is not repealed, it is contended that the words are intended to give a fair alternative for actual rent. This rateable value could not be, since the overseers might make any arbitrary deduction (ninety per cent. if they chose) from the gross value—*The King* v. *Brograve* (10). Thus they would have the power of fixing the water rate at their pleasure. Gross value is the starting point from which the computation is made, and "assessment" means "computation." If rateable value was meant, why were not the words used which are frequently found elsewhere—namely, "amount at which the premises are rated for the relief of the poor"?

Davey, Q.C., in reply.

Cur. adv. vult.

Lord Bramwell.—In this case your Lordships intimated at the last sittings that you would give judgment in favour of the appellant, saying that you would state your reasons at a subsequent time. I have prepared some reasons which I propose now to submit to your Lordships.

I think this case may be dealt with as governed by the 15 & 16 Vict. c. clvii. s. 46. For either that is the same in effect as the 7 Geo. 4. c. cxl. s. 27 (which I do not think), or it is different. If the former, the meaning of the two being the same, either may be considered; if the latter, then the provisions of the later Act put an end to the operation of those of the former. In either case it may be disregarded. An Act which says the law in future shall be different from what it was, may not, strictly speaking, be said to repeal it, but it abrogates it for the future. The question, then, is, what is the meaning of "annual value" in section 40 of the 15 & 16 Vict. c. clvii. Now, without undertaking an all-sufficient definition, it seems to me we may safely adopt that in the 6 & 7 Will. 4. c. 96—namely, "the rent at which they would let, free of all usual tenant's rates and taxes, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." This is their value. If a rent exceeding this cost could not be got, they would be valueless. It is as impossible to say that the annual rent without such deduction is the annual value, as it is to say that the daily hire of a horse is its daily value without deducting for its keep, &c. This is the value—the net, the only value. The Solicitor-General said that this was to interpolate the word "net." That is not so. Value means net value; net value means value. He did propose to interpolate a word, "gross." Now gross value is different from value. It is, though a convenient, an inaccurate expression, like "gross profits." The difference between what a thing costs and the larger sum it sells for is not profit, if the buying and selling are attended with expense to the trader. Value is net value, and involves those deductions from rent which the appellant claims. I am confirmed in this by the provision in the 15 & 16 Vict., which makes the owner liable for the water rate of small tenements. What is the value of them to him? What he gets *minus* what it costs him to get it. But the value cannot be greater in the hands of the tenant.

Hamilton v. *Bass* (11) is really in point.

(9) 2 Com. B. Rep. 210; 15 Law J. Rep. C.P. 160.

(10) 4 Burr. 2491.

(11) 12 Com. B. Rep. 631; 22 Law J. Rep. C.P. 29.

Property was let at a gross yearly rent of 75*l.* 15*s.*, with an agreement that the landlord should pay all rates and taxes. Deducting them, and 1*l.* 6*s.* for expenses of collection, and 4*l.* for repairs, the net rent was reduced below 60*l.*, and it was held that this did not qualify thirty 40*s.*-freeholders, the statute 8 Hen. 6. c. 7, giving the right of voting to those who have "free land or tenement of the value of 40*s.* by the year at the least, above all charges." Mr. Justice Maule said, "If a man has a piece of land by means of which he can enable himself to expend 40*s.* a year by laying out 5*s.* upon it, can that be said to be of the value of 40*s.* a year?" Judgment was given against the vote on this reasoning.

In *Colvill* v. *Wood* (9) it was indeed held that the fair annual rent of premises is the proper criterion of their clear yearly value within the statute 2 Will. 4. c. 45. s. 27, without making any deductions for landlord's repairs. But that case was expressly decided on the ground that the vote was given to the occupier, and that it was "obvious the Legislature could never have intended that the right of a tenant to vote should depend on calculations so nice, artificial and difficult of application" as what the value was to the tenant, that depending "on the use to which he puts it," and other matters.

THE LORD CHANCELLOR (EARL OF SELBORNE).—I agree, as I believe all your Lordships agree, in the result and generally in the reasoning of the opinion which has just been delivered. I should like to add a few words, because I confess that there is a single point, which is not material to the result, upon which I am not sure that my opinion is quite the same as that of my noble and learned friend who has just addressed your Lordships. My noble and learned friend, as I understood, expressed an opinion that the meaning of the words "annual value" may be, if it is not, different in the two Acts—namely, 7 Geo. 4. c. cxl. and 15 & 16 Vict. c. clvii. He gives reasons, in which I concur, for thinking that if that be so, or whether it be so or not, it makes no difference in the result. I confess that I am not inclined myself to differ from the two Courts below upon that particular point. They thought that nothing was really altered by the later Act except the steps of the scale, if I may so name them, but that the words "annual value" in the later Act had the same meaning with those in the earlier Act, and made it competent, if it were necessary or useful, to refer to the earlier Act for the elucidation of that meaning. I confess that that having been the opinion, as I read it, of all the Judges in both Courts below, I am not prepared to dissent from them. The words in the original Act are "the actual amount or annual value," and then it refers to the computation of the assessment to the poor rate. The words in the later Act are "the annual value" throughout, it being expressly declared that the earlier Act is not to be "repealed, altered, interpreted or in any manner affected" by the later Act, except as expressly follows from it. Well, I cannot but think that, reading the earlier Act with the later, the words "the annual value," upon those Acts alone, ought to be taken to mean the same thing in the second Act as they mean in the first. That might be very important if I agreed (as I do not agree) with the interpretation in the first Act which is placed upon the words by the Court of Appeal; but I confess that the words of the first Act only appear to me to make that which I should have thought reasonably clear without them, more expressly clear—namely, the words "the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated." Now, that does not appear to me to relate to the computation in any particular year, but it is as from time to time computed; and whether you look to the principle of valuation upon which the computation of the assessment to the poor rate proceeded in the seventh year of King George the Fourth, or to that which, in order to cut off all opportunity for abuse, was expressly declared by the Poor Rate Valuation Act of 6 & 7 Will. 4. some years afterwards, it appears to be perfectly clear that the mode of valuing for the purpose of computing the assessment to the poor rate was first to ascertain what is

called the gross value, then to make the deductions necessary in order to arrive at the real value; and, the value having been so ascertained, the computation of the assessment to the poor rate was practically the same whether it did or did not proceed to cut off equally all round a certain part of the value ascertained with reference to the real facts of the case. That appears to affect the assessment merely, but not the principle of valuation or the principle of computation. I agree with Lord Coleridge that the Act did not refer to the assessment itself, but referred to the value upon which the assessment was computed. But the value upon which the assessment was computed was, in principle, and properly, the net value, and not the gross value; and it is expressly so declared to be, for the purposes of the poor rate, by the later Act of the 6 & 7 Will. 4.

I thought it desirable to say as much as I have now said, because, assuming the second Act, as far as the use of the words "annual value" is concerned, not to use them in a different sense from the first, I think that the light which the former Act throws upon the latter is not against but will favour the conclusion at which your Lordships have arrived. I entirely agree with my noble and learned friend who has just addressed your Lordships, that as we have to deal with the word "value" we must take that word in its natural sense, unless there is something in the Act that points to an artificial or arbitrary sense, which I do not discover. Therefore, I understand my noble and learned friend to move that the judgment under appeal be reversed, and that the order of the Queen's Bench Division be affirmed.

Lord Blackburn.—I entirely agree with the result which has been arrived at by your Lordships—namely, that the order of the Court of Appeal should be reversed and the order of the Queen's Bench Division affirmed; and I rather think that in substance there is no great difference in the way in which one comes to that result. I quite agree with the noble and learned Lord opposite (Lord Bramwell) in what he says, that when the second Act was passed reciting the first and saying that it was not repealing it, if it enacted a rule that was contrary to it, it had really the effect of repealing it, and it was the same thing as if it had been repealed. I quite agree with the noble and learned Lord in that. I quite agree also with what the noble and learned Lord on the Woolsack has said—namely, that if the former Act had the same meaning as the second one has, which of course involves the question whether the Court of Appeal are right in the construction which they put upon it, it would be a great additional reason for saying, "We hold this construction of the Act."

But the real point upon which it seems to me that the whole thing ultimately turns is this, Are the words "annual value," as used in this Act, *prima facie* to mean the real annual value expressed and explained in the Parochial Assessment Act—that is to say, the value after deducting the necessary burdens upon it—or not? After considering the case, and considering what has been said and the cases which have been cited, I cannot bring myself to doubt that that is the ordinary and proper meaning of the word "value" when it is used, unless there be something to shew that the Legislature intended it in a different sense, which of course there might be. And the one point upon which I was rather desirous of saying a word is this, that I do not think it is to be understood (and certainly I myself do not so understand) that the case of *Colvill* v. *Wood* (9), which has been referred to, in which it was decided that in the Reform Act the words "annual value" were to be understood not in this way but as meaning the rent, is in fact overruled—I do not think that it is—I do not enquire at present whether the reasoning there is to my mind quite satisfactory or is not—I do not care how that is; but as regards the Reform Act, after the thirty years that it has been acted upon, I should not hesitate in saying that it is too late to cast any doubt upon it. But the question is whether or not that is the general rule. Now I quite agree with what has been said by the noble and learned Lord opposite (Lord Bramwell) as to the circumstances of that Act, and as to giving the franchise to a person, that that might apply to cut down or alter the words used there as meaning something different and something less than they would have meant generally if

they had been used in another way. But if that case is to be considered as saying that in all cases the value was to mean what was contended for by the waterworks company here—namely, the rental without regard to the deductions from it in order to make it the real value—I cannot agree with it. I think that the general meaning of these words, unless there be something to alter it, is that which is put upon them by your Lordships, and consequently that the decision of the Queen's Bench Division was the right one, and that the decision of the Court of Appeal was founded upon a mistake and ought to be reversed.

LORD WATSON.—I concur. I agree with the process of reasoning by which my noble and learned friend on my right (Lord Bramwell) has shewn that in his opinion the words "annual value" occurring in the statutes which we have to construe signify annual net value, which I should take to be the primary meaning of the words. I do not understand that the judgment of this House or the opinion of my noble and learned friend goes beyond that, or decides that in every statute, no matter what is the context, these words are to be read as meaning net value.

LORD BRAMWELL.—I wish to state that my noble and learned friend Lord Fitz-Gerald is unable to attend to-day, but has sent to me to say that he concurs in the reasons which I have suggested to your Lordships for this judgment.

Order of the Court of Appeal reversed. Order of the Queen's Bench Division restored.

The respondents to pay the costs of the appeal in the Court of Appeal, and of the appeal in this House.

Solicitors—Hollingsworth, Tyerman & Andrewes, for appellant; Bircham & Co., for respondents.

[IN THE COURT OF APPEAL.]

1883. Nov. 24. } GOUTARD AND ANOTHER *v.* CARR AND ANOTHER.*

Practice—Costs—Mode of Taxation—Reference with Costs to abide the Event—Award in favour of Defendant, certain Issues being found for Plaintiff—Costs of Separate Issues.

In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into Court in satisfaction of the plaintiffs' claim. This sum the plaintiffs did not accept. The cause was referred, the costs of the cause, reference and award to abide the event. The arbitrator found all the issues, except one as to special damage, in favour of the plaintiffs; and he also found that the money paid into Court was enough to satisfy the plaintiffs' claim in respect of the subject-matters of the action: —Held, *that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiffs were entitled to the costs of the issues on which they had succeeded, for that the costs ought in such a case to be taxed in the same manner as though the action had been tried out in the ordinary course of law.*

Appeal from the Queen's Bench Division.

Action by the plaintiffs, as persons entitled to and in possession of certain premises, for damages for an obstruction to a ditch caused by the defendants, and claiming to recover special damage.

The defendants denied the plaintiffs' title, the obstruction and the special damage; and the defendant Carr pleaded, in the alternative, that "if by reason of any wrongful act of himself, his servants, agents or workmen, the plaintiffs sustained damages as in the statement of claim alleged, the sum of 190*l.* is sufficient to satisfy the plaintiffs' claim in respect thereof, and the defendant brings into Court the said sum of 190*l.*" The plaintiffs declined to accept the money so paid in, in satisfaction of their claim.

The cause was afterwards referred, with a provision that the costs of the cause, of

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

the reference and of the award should abide the event of the arbitration.

The arbitrator found in favour of the plaintiffs on all the issues raised except that of special damage, which he found in favour of the defendants, finding also that the sum paid into Court was enough to satisfy the plaintiffs' claim.

The defendants thereupon signed judgment, with costs against the plaintiffs; but, on the application of the plaintiffs, Williams, J., amended that judgment by ordering that the plaintiffs should recover the costs of the action, reference and award, except the costs of the issue whether the sum paid into Court by the defendant Carr was sufficient, the costs of which issue were to be paid by the plaintiffs to the defendant Carr.

The Divisional Court affirmed that order; but the Court of Appeal varied it by ordering that the general costs of the cause and reference should be given to the defendants, reserving the question as to the costs of the several issues.

Shortt (with him *McIntyre, Q.C.*), for the defendant Carr.—No costs should be allowed to either party on the issues on which the plaintiffs succeeded—*Reynolds* v. *Harris* (1).

T. Wheeler (with him *Charles, Q.C.*), for the plaintiffs.—The plaintiffs are entitled, at the least, to the costs of the issues found in their favour; for the arbitrator has disposed specifically of each issue, so that the officer of the Court can tax the costs in favour of the party which has succeeded—*Brooks* v. *Parsons* (2), *Kilburn* v. *Kilburn* (3) and *Ellis* v. *De Silva* (4).

BRETT, M.R.—This appears to me to be an important matter, and I have therefore obtained assistance from persons who have experience in such matters as these. The result is that, as far as I can gather, it is not very clear how such a matter as this was dealt with before the Judicature Act. One way was that, where there was a cause of action, in answer to which the defendant set up many defences, each going to the whole cause of action, and where the cause was referred, with a proviso that the costs should abide the event, then if several issues were found for the plaintiff, and one issue, going, as I have said, to the whole cause of action, was found for the defendant, the defendant got not only the general costs, but he was also paid the costs of all the issues which he had forced upon the plaintiff, and to the expense of proving which he had put the plaintiff, even though he failed on all but one. That, I confess, seems to me to be very unjust, and I am not surprised to find that that rule is nowhere laid down as a universal rule, or that no such practice existed as an invariable practice.

Another way in such a case was, it would seem, to hold that the defendant was entitled to the general costs of the cause and to the costs of all issues found in his favour; but that no costs were allowed to him on the issues on which the plaintiff succeeded, although he was not compelled to pay the costs of those issues. Now that appears to me to be equally unjust on a minor scale.

Take as an example a patent case in which the plaintiff sues for the infringement of his patent: the defendant denies the existence, the validity and the infringement of the patent. The case is referred, and the plaintiff succeeds, after an expensive enquiry, in establishing his patent; but the defendant succeeds on the question of infringement. There could be nothing which would justify him in disputing the validity of the plaintiff's patent and in obliging the plaintiff to go into that expensive enquiry, and yet it is said that he is either to get the costs of those issues on which the plaintiff succeeded, or at all events that he is not to pay them. Since the Judicature Act the defendant can in such a case deny the novelty, the utility and the infringement of a patent, and thus put the plaintiff to the proof of all those matters; and then he can, as an alternative defence, pay into Court a sum of money, alleging that the plaintiff has not suffered any damage beyond that sum paid in. The defendant may in such a case fail on every point of the enquiry save one, and succeed on the question whether he has paid

(1) 3 Com. B. Rep. N.S. 267; 28 Law J. Rep. C.P. 26.
(2) 1 D. & L. 691.
(3) 13 Mee. & W. 671.
(4) 50 Law J. Rep. Q.B. 328; Law Rep. 6 Q.B. D. 521.

enough into Court to meet the damage; and yet it is said that he is to get all the costs of the issues on which he has failed; or, according to the other view, that he is not to pay those costs. Those two views appear to me to be unjust, and I cannot find any decision or any invariable practice to that effect.

Since the Judicature Act a defendant can deny the right and title of the plaintiff, and he can also, as an alternative defence, pay money into Court; that was done here, the case was then referred, costs to abide the event. The event is in favour of that party in whose favour judgment would be entered if the same judgment were given at a trial at law as is given in the arbitration. In this case the event was in favour of the defendant Carr, and he is entitled to costs. But the question is raised, to what costs is he entitled; he is, I think, entitled to have the costs taxed as they would be taxed if the case had been tried out at law.

The event being in the defendant's favour, he is entitled to the general costs of the cause, to the costs of all the issues found in his favour, and probably of all evidence common as well to other issues as to those found in his favour. But the party who succeeds on the issues on which the defendant fails is entitled to the costs of those issues, for the costs must be taxed exactly as if the event had been arrived at by a trial at law in the ordinary way. In the case now before us the defendant Carr gets, therefore, the general costs of the cause and reference, and the costs of the issues on which he has succeeded; while the plaintiffs get the costs of all the issues on which they have succeeded. As each party has partially succeeded on this appeal, there will be no costs of the appeal.

BAGGALLAY, L.J.—I am of the same opinion. The Judicature Act altered the mode of pleading; it enabled a defendant to deny the cause of action, and also to pay money into Court. *Berdan* v. *Greenwood* (6) and *Hawksley* v. *Bradshaw* (7) established that such a mode of pleading was not embarrassing.

(6) 47 Law J. Rep. Exch. 628; Law Rep. 3 Ex. D. 251.

(7) 49 Law J. Rep. Q.B. 333; Law Rep. 5 Q.B. D. 302.

In this case there were alternative defences, the case was then referred; the costs of the cause, award and reference were to abide the event. The case is, in my opinion, to be considered as being in the same position as if it had been tried out in the usual way, and as if a judgment had been pronounced at the trial. *Ellis* v. *De Silva* (4) shews that the word "event" ought to be read distributively, and the costs must be apportioned according to the results of the issues. The defendant Carr here will get the general costs of the cause and reference, but the plaintiffs will get the costs of the issues on which they have succeeded.

BOWEN, L.J.—I am of the same opinion. The costs here are by agreement to follow the event—that is, the costs are to be taxed as though the event had been determined by a trial in the ordinary course of law.

Judgment accordingly.

Solicitors—Wright & Pilley, agents for Ruston, Clarke & Ruston, Brentford, for plaintiffs; Carr & Co., for defendants.

1883. July 19.

THE QUEEN (*on the prosecution of the Assessment Committee of the Poplar Union, respondents*) *v.* THE EAST AND WEST INDIA DOCKS COMPANY (*appellants*).

Rating — Quinquennial Valuation — Supplemental Valuation—"Alteration"—"Preceding Twelve Months"—Evidence—Valuation (Metropolis) Act, 1869 (31 *&* 33 *Vict. c.* 67), *ss.* 46 *and* 47.

[For the report of the above case, see 53 Law J. Rep. M.C. 20.]

[IN THE COURT OF APPEAL.]

1883. Nov. 28. DAVEY *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.*

Negligence—Contributory Negligence—Railway Company—Level Crossing—Accident caused by Plaintiff's Negligence.

The defendants' line of railway crossed a public footway and carriage way on the level. There were carriage gates at the crossing, which were locked, a gatekeeper being stationed there by the defendants whose duty it was to open and shut them when required; the wicket-gates used by foot passengers were not fastened. There were trees and houses on one side of the crossing so situated as to make it impossible for any one crossing from the down side to see a train coming until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view of the line for a distance of about 300 *yards. The plaintiff passed through the wicket-gate for the purpose of crossing from the down-line side to the up-line side of the crossing, and walked over the down line to the centre of the crossing, and thence on to the up line, when he was knocked down and injured by a train travelling on the up line. The plaintiff admitted that if he had looked along the up line before actually crossing the up metals he must have seen the approaching train; but he also said that he was misled by the conduct of the gate-keeper, who did not take any steps to warn the plaintiff of the danger of crossing, or to prevent him from doing so. It was also admitted that the engine-driver of the train did not whistle. Upon these facts, the Judge at the trial nonsuited the plaintiff:*—Held (*per* BRETT, M.R., *and* BOWEN, L.J.; BAGGALLAY, L.J., *dissentiente*), *that the nonsuit was right, upon the ground that the uncontradicted evidence of the plaintiff, and the admitted facts, shewed that the accident was solely due to the plaintiff's own recklessness, and that there was no evidence of negligence on the part of the defendants.*

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 665) *affirmed.*

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

Appeal by the plaintiff from a decision of the Divisional Court discharging a rule for a new trial. The case is reported 52 Law J. Rep. Q.B. 665, where the facts are fully set out. The arguments were substantially the same as in the Court below, but it was in addition argued, on behalf of the plaintiff, that a duty was imposed upon the defendants, under the provisions of 8 Vict. c. 20. s. 47, to have a man stationed at the level crossing to warn foot passengers of danger.

Kemp, Q.C., and *Cyril Dodd*, for the plaintiff.

Murphy, Q.C., and *R. G. Arbuthnot*, for the defendants.

Stubley v. *The London and North Western Railway Company* (1), *Staples* v. *The London, Brighton and South Coast Railway Company* (2), *The Dublin, Wicklow and Wexford Railway Company* v. *Slattery* (3), *Bridges* v. *The North London Railway Company* (4) and *Cliff* v. *The Midland Railway Company* (5) were referred to.

BRETT, M.R.—In this case I have come to the conclusion that the evidence of the plaintiff was so clear that there was no room for any question to be left to the jury. That being so, the authorities shew that the Judge was entitled to withdraw the case from the jury. In such an action as this the burden of proof lies upon the plaintiff to establish two things—the one affirmative, and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants or of those for whose negligent acts they are liable, and that that accident was produced as between him and the defendants solely by their negligence, in this sense that he himself was not guilty of any negligence which contributed to the accident. Because even though the defendants were guilty of negligence which contributed to the

(1) 35 Law J. Rep. Exch. 3; Law Rep. 1 Exch. 35.
(2) 35 Law J. Rep. Exch. 7; Law Rep. 1 Exch. 21.
(3) Law Rep. 3 App. Cas. 1155, 1166 (Irish).
(4) 43 Law J. Rep. Q.B. 151; Law Rep. 7 H.L. Cas. 213.
(5) Law Rep. 5 Q.B. 258.

accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover; it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff although he was negligent, then the negligence of the plaintiff would not contribute to the accident. It seems to me that the plaintiff did give evidence, though not strong evidence, which would have justified the jury in saying that the accident was caused, in part at least, by the negligent acts of the defendants or their servants. Where a train is approaching a level crossing over which people are in the habit of going, it is the duty of the servants of the railway company to take reasonable precautions to warn persons who are about to cross of the approaching train; and a jury may say that they are bound to manage the pace of the train so that it shall not come suddenly upon the foot passengers. The jury, therefore, might reasonably have said in the present case that the train ought not to have been coming too fast—if it had been coming fast—and also that, at whatever pace it might have been coming, it ought to have whistled. But there is no evidence that it was coming at any unusual or unsafe pace, and, in fact, it was admitted that the driver did not whistle, and I think the jury might have reasonably found that the driver ought to have whistled. But the burden lay upon the plaintiff of proving that he had not been guilty of conduct of which a reasonable man ought not to have been guilty, and which contributed to the accident. It was admitted by the plaintiff that if he had looked up the line he must have seen the train approaching, and therefore, if he had looked, he ought not to have crossed. But then comes the question whether he ought to have looked. The evidence shews that he looked to the right, and, seeing no train approaching, crossed over the line of rails nearest to him. It is obvious that if he had looked to the left when so crossing he must have stopped—he had time to stop; and, inasmuch as it was broad daylight at the time, he was doing that which, if he had not been misled into not looking, any reasonable man with reasonable care would not have done, and was therefore guilty of negligence. If a man omits to do what any reasonable man with reasonable care would, under the circumstances, have done, that is negligence, and that is the way in which the case should be put to the jury. It was suggested that the plaintiff had been misled. But that is not sufficient; it is not enough that he was misled, it must be shewn that he was and ought to have been misled—that is, that a person with ordinary care would have been misled under the circumstances. It was said that the plaintiff was misled by the fact that he saw a railway servant at the crossing who did not signal to him. But he had no right to suppose that the servant was put there for the purpose of signalling to foot passengers. Then comes the question whether the defendants ought to have had a man at the crossing for that purpose, and whether he ought to have signalled to the plaintiff. It would have been sufficient for the purpose of the plaintiff's case if the railway company had had a man there who had ordinarily signalled to persons, whether it was his duty to do so or not; but here there is no evidence that he had ever signalled to any person. The only evidence is that he was there, and the inference is that he was there to do that which the company were bound to do—namely, to warn carriages and carts as to the time when they might cross the railway, and to open and shut the gates. That, however, had nothing to do with the footway. I therefore think that the plaintiff was not entitled to be misled by the fact that the railway servant did not signal to him. The plaintiff, by his own evidence, has shewn that he omitted to do that which any careful man in his position would have done; and therefore, upon uncontradicted evidence, he himself has shewn that he was guilty of negligence which contributed to the accident. I therefore think that the Judge was bound to nonsuit the plaintiff.

BAGGALLAY, L.J.—I have the misfortune to differ from the other members of the Court. The ground upon which the plaintiff was nonsuited at the trial was that

the uncontradicted facts shewed that the plaintiff's own negligence was the sole cause of the accident, and that there was no evidence for the jury of negligence on the part of the defendants. The facts which supported the view of the plaintiff that there was evidence to go to the jury of the defendants' negligence were these: first, there was a level crossing, which, it was suggested, and with some force as it seems to me, was a dangerous crossing, by reason that it approached within a few feet of the railway itself, and that therefore it was the duty of the railway company to use reasonable precautions to prevent injury to foot passengers as well as to carriages and carts while crossing. Again, it was admitted that the usual intimation of an approaching train was not given, for the train by which the accident was caused approached the level crossing without whistling; and that, I think, was a matter which might properly be taken into consideration by the jury as to whether there was negligence on the part of the defendants. The judgment of Lord Cairns in the case of *The Dublin, Wicklow and Wexford Railway Company* v. *Slattery* (3) forms an admirable guide in cases like the present. The illustration there put of a man who, in broad daylight, and without anything either in the structure of the line or otherwise to obstruct his view, crossed in front of and was killed by a train which ought to have whistled when passing through a station but did not, was a very slightly different case from the one actually before the House; but that difference was sufficient to induce him to take the view that the case was one which had been properly left to the jury.

The difference between *Slattery's Case* (3) and the present one is that Lord Cairns did not come to any conclusion as to whether the plaintiff could have seen the train; but, assuming that he could not have seen it when crossing to the down line, directly he got to the six-foot way he could have seen it; whereas in the present case there were nine feet to be passed before the plaintiff was upon the six-foot way, and when there he could have seen the train.

Now was there anything as regarded the conduct of the railway company or their servants, or in the surrounding circumstances, which would throw a man off his guard? If he had first seen the train at the moment when he stepped upon the down line, he might have stopped himself. But in addition to that, there was the absence of anything to give him intimation of an approaching train; and therefore the fact of the porter standing with a furled flag and talking to some persons appears to me to be a circumstance which ought to have been taken into consideration by the jury, to enable them to come to a conclusion whether or not there was that amount of negligence which would entitle the defendants to a verdict on the ground that there was contributory negligence. It appears to me that there was no contributory negligence on the part of the plaintiff; but I do not go so far as to say that there was no evidence on the second issue which ought to have been left to the jury. On these grounds I am unable to agree with the view of the case taken by the other members of the Court; but I differ from them with great hesitation.

Bowen, L.J.—I have come to the conclusion that the ruling of Mr. Baron Huddleston at the trial was correct, and that the Divisional Court were right in upholding the nonsuit. It is important to draw the line clearly between the functions of the Judge and the functions of the jury; and there is this cardinal maxim to be borne in mind—that it is not because facts are admitted that it is therefore necessarily the Judge who is the person to say what the decision upon them should be. If facts are admitted which admit of two possible views which reasonable people may take, and one of those possible views is more consistent with the case for the plaintiff than for the defendant, it is the duty of the Judge to let the jury decide between the two conflicting views. That is an observation to be made in favour of the plaintiff.

The questions in this case are, first, whether there is any evidence of negligence in the conduct of the company; and, secondly, whether there was negligence in the conduct of the company which led to the accident—or, to use the language of

Lord Cairns, whether there was evidence of *incuria dans locum injuriæ*. If the matter had rested simply upon the first point, I should have been of opinion that the case could not have been properly withdrawn from the jury; though, sitting as a jury, I should not myself have come to the conclusion that the company were negligent. That, however, was a question for the jury to decide, so far as I have indicated. No statutory obligations, so far as I am aware, have been imposed upon railway companies in respect to level crossings. Whether a railway company have or have not taken proper precautions with regard to the speed of a train or the warning to be given when it is passing a level crossing, is a question of fact in each case. A plaintiff must shew some circumstances from which a reasonable person might come to the conclusion that the company ought to have done more than they did; but, speaking broadly, a railway company are only bound to do what is reasonable, having regard to the special character of the crossing. But, secondly, was there any evidence from which reasonable men could infer that the accident had arisen from anything the defendants' servants had either done or left undone? The plaintiff here knew this part of the line, and that when the line was clear the carriage gates might be open, but that when there was danger they might be shut. He also knew, and this I think was beyond all question, that it was the duty of the railway servant to open and shut the carriage gates. It was broad daylight, and as soon as he had entered the wicket-gate he failed to do what any sensible man would have done—namely, to look up and down the line to see whether a train was approaching; and a train was in fact so close upon him that he had only time to cross about fifteen feet before he was knocked down. Applying the maxim to which I have already referred, are there two reasonable views possible as to such conduct? Is it open to any reasonable mind to draw the inference that the accident was not caused by the gross negligence of a man who never looked at a train which was within a few feet of him? There was a great deal of force in the argument of Mr. Dodd that under the circumstances the plaintiff had been misled by what he saw about him, if there had been any evidence upon which to found it; but there was none. Even admitting that the plaintiff had been misled, the question, as has been stated by the Master of the Rolls is, whether he had been reasonably misled. It is not necessary to decide the question whether he was reasonably misled by any conduct of the company's servants, because I agree that it might perhaps be sufficient if he was misled by any one at all under circumstances which would mislead a reasonable man. There was no evidence here from which, taking the plaintiff's story to be true, the jury would have had a right to consider that he had been reasonably misled by any one.

The only conclusion that is open to a reasonable person, upon the account given by the plaintiff of his conduct, is that the accident was caused directly by his own negligence. In *Slattery's Case* (3) the Judge at the trial had left the question to the jury, and the question for the House of Lords was whether the plaintiff ought to have been nonsuited or not. That question was divided into two parts —first, whether there was evidence of negligence for the jury; and, secondly, whether, even assuming there was negligence *prima facie* in the company, that negligence could have caused the accident; or whether there was not such clear contributory negligence on the part of the plaintiff as to render it impossible for any reasonable person to suppose the accident was caused by any one except the plaintiff himself. The observations of Lord Cairns arose solely upon the second branch of the argument in that case, and upon a question of the kind like the present one —namely, whether taking the account given by the plaintiff and the admitted facts, the accident could, in the opinion of any reasonable person, be caused by anything except the plaintiff's own negligence. In *Slattery's Case* (3) Lord Cairns thought that upon the admitted facts it could not be said that the plaintiff's conduct was not open to two views; and the reason he thought so was because the plaintiff was crossing in the night-time a station where the trains ought to have whistled when crossing at that time, and that, without

the evidence being very distinct on the controverted question whether he must have seen the train if he had looked. That conduct admitted of two reasonable views, and on that ground Lord Cairns thought that the plaintiff ought not to be nonsuited. If the facts of the present case had been exactly within those of *Slattery's Case* (3) I should have come to the same conclusion; but as they do not leave open two reasonable views of the plaintiff's conduct, I think that he was rightly nonsuited. Although I feel the force of the doubt expressed by Lord Justice Baggallay, I think that the judgment of the Court below was right, and ought to be affirmed.

Appeal dismissed.

Solicitors—J. Perry Godfrey, for plaintiff; Bircham & Co., for defendants.

[IN THE COURT OF APPEAL.]

1883. Dec. 13. SCARLETT *v.* HANSON.*

Sheriff—Equitable Interest—Duty of Sheriff to seize—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 13—*Rules of Court*, 1883, *Order LVII. rule* 12.

Where a sheriff having seized goods under a writ of fi. fa., withdrew without interpleading, and returned nulla bona on finding that they were assigned under a bill of sale to another person, and where in the event the goods proved to be worth more than the sum for which they were so assigned,—Held, *that the execution creditor could not maintain an action against the sheriff, for that section* 13 *of the Common Law Procedure Act*, 1860, *does not give the sheriff power to seize such an equitable interest of the execution debtor as alone existed in this case.*

Appeal from the judgment of Manisty, J., at the trial without a jury.

Action by the plaintiff, a judgment creditor of one Thoumire, to recover damages from the sheriff of Middlesex for neglecting to levy on the goods of the execution debtor, and for making a false return of *nulla bona*.

The plaintiff obtained a judgment against Thoumire, and on the 23rd of December, 1881, a writ of *fi. fa.* was delivered to the sheriff, whose officer entered on the debtor's premises and seized his goods; but on the following day he withdrew, because all the execution debtor's goods had been previously assigned by a bill of sale to the Union Deposit Bank. The sheriff did not interplead. The execution debtor afterwards went into liquidation, when it appeared that the value of his goods exceeded by 100*l.* the amount secured by the bill of sale.

The plaintiff accordingly sued the sheriff for damages.

Manisty, J., gave judgment for the defendant.

The plaintiff appealed.

R. V. Williams, for the appellant.—The sheriff ought not to have withdrawn; he should have interpleaded. Before 1860 he could not have done so; but the Common Law Procedure Act, 1860, s. 13 (1), altered the law, and made that available for execution which before was not so available. The sheriff has not an option as to this matter; it is a right given to the execution creditor by the statute, so that an equity of redemption can now and ought now to be seized. If a claimant establishes a title to goods which exceed in value the sum for which they are pledged to him, still the security of the execution creditor is not defeated.

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) 23 & 24 Vict. c. 126. s. 13:—"When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels by way of security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just."

Rule 12 of Order LVII. of the Rules of Court, 1883, is to the same effect.

Scarlett v. *Hanson, App.*

[BRETT, M.R.—The section does not give the sheriff the power; it is given to the Court or a Judge.]

The preamble of the statute shews that the intention of the Act was to enlarge the jurisdiction of the Court, and the sheriff is the officer of the Court, so that by implication section 13 (1) enlarges not only his rights but also his duties.

Cock (with him *C. Scott*), for the defendant, was not called on.

BRETT, M.R.—In this case the sheriff seized certain goods. A person then claimed to be the owner of the goods, for the reason that he held a bill of sale over them. This bill of sale the sheriff considered to be a valid bill, so that he did not interplead, but he withdrew; and then being called on to make a return, he returned *nulla bona*—that is, *nulla bona* belonging to the execution debtor available for execution.

It must be taken for the purposes of this case that if the goods had been sold, the proceeds realised would have exceeded the amount secured by the bill of sale, so that the execution debtor had an equitable right to the surplus.

It is argued on behalf of the appellant that the sheriff ought not to have withdrawn, and that he has made a false return.

It is admitted that if the sheriff had done what he has done in this case prior to the coming into force of the Common Law Procedure Act, 1860, he would have been justified; but it is said that section 13 (1) of that Act altered both the law and the duty of the sheriff. Now it is clear that that section in terms only gives the power conferred by it to the Court or a Judge, and that it does not interfere with the duties of the sheriff; but it is then argued that the section does by implication give a sheriff the power to seize something which he could not seize before that Act. It is said that by implication the sheriff gets in such a case as this power to seize and to hold until the claimant has an opportunity of getting an order for a sale.

But the argument must be that the sheriff is obliged in such a case to take out an interpleader summons, for it is on such a summons that the Judge makes the order for sale. That seems to me to be a strong proposition and a strong inference from the words of the statute. The duty of the sheriff is to seize the goods. When he has done so, and it turns out that the bill of sale holder has a legal and beneficial interest in those goods, then can it be said that the sheriff is to seize the goods of a person against whom no judgment has passed? It is said that he must, and that he must interplead. The Act certainly does not say so; and if it is urged that he is to seize the equitable interest of the execution debtor, that is in fact to say that he is to seize goods in which some one not a party to the cause has a primary interest. The sheriff is bound to obey the writ, and in circumstances such as these he cannot sell without an order of the Judge, for section 13 (1) does not give any power to the sheriff which he can exercise by virtue of the writ; but he must further have an order of the Court.

I am of opinion that the section means what it says, and that it does not alter the rights or duties of a sheriff under a writ of *fi. fa.* I agree, therefore, with the judgment of the learned Judge, and this appeal must be dismissed.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Butterfield, for appellant; Maynard & Burchell, for respondent.

[IN THE HOUSE OF LORDS.]

1883. April 23, 24. THE JUSTICES OF LANCASHIRE *v.* THE MAYOR, ETC., OF ROCHDALE.

Highway—Liability to Repair—Main Road—Portions of a Road ceasing to be Turnpike Road—41 & 42 *Vict. c.* 77. *s.* 13.

[For the report of the above case, see 53 Law J. Rep. M.C. 5.]

1883. Dec. 4. } THE SWANSEA CO-OPERATIVE BUILDING SOCIETY *v.* DAVIES.

Practice — Remitted Action — Trial by Judge without a Jury—Motion for New Trial—19 & 20 *Vict. c.* 108. *s.* 26—*Order XXXIX. rule* 1.

Under the Rules of the Supreme Court, 1883, *a motion for a new trial in an action remitted for trial to the County Court, under* 19 & 20 *Vict. c.* 108. *s.* 26, *and there tried by the Judge without a jury, must be made before a Divisional Court, and not in the Court of Appeal.*

Motion for a new trial in an action remitted to the County Court, under 19 & 20 Vict. c. 108. s. 26, and tried by the Judge without a jury.

Cruikshank, for the plaintiffs, took the preliminary point that the motion ought to be to the Court of Appeal, under Order XXXIX. rule 1, which requires that every motion for a new trial, or to set aside a verdict, finding or judgment, shall be made in every cause or matter where there has been a trial without a jury by appeal to the Court of Appeal.

J. Ashton Cross, for the defendant, cited *London* v. *Roffey* (1) and *Davis* v. *Godbehere* (2).

DAY, J.—I am of opinion that this objection must be overruled. I rest my judgment entirely on the case of *Davis* v. *Godbehere* (2). There is nothing in the new rules to make an alteration in the practice settled under the old rules by that case.

SMITH, J.—I am of the same opinion. An action remitted to the County Court for trial is said to come within Order XXXIX. rule 1. I was at first inclined to think that the wording of the new rule made an alteration in the practice, because it uses the words "cause or matter" instead of "action," and omits the words "by a Judge" in the passage "trial by a Judge without a jury." It was, however, pointed out that no time was limited for making the motion if this rule applied, and I do not think it could have been intended to alter the rule laid down in *London* v. *Roffey* (1) and *Davis* v. *Godbehere* (2).

Objection overruled.

Solicitors—H. Thomas, agent for R. T. Leyson, Swansea, for plaintiffs; R. White, agent for Evans & Davies, Swansea, for defendant.

(1) 47 Law J. Rep. Q.B. 16; Law Rep. 3 Q.B. D. 6.

(2) 48 Law J. Rep. Exch. 440; Law Rep. 4 Ex. D. 215.

[IN THE COURT OF APPEAL.]

1883. Dec. 8. } *In re* HARDWICK.*

Practice — Appeal — Jurisdiction of Court of Appeal—Solicitor—Appeal from Order striking off the Rolls—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

An appeal lies from an order of the High Court striking a solicitor off the rolls for misconduct as a solicitor, for the Court in such a case exercises its disciplinary jurisdiction over one of its officers, and does not give a judgment in a criminal cause or matter within the meaning of section 47 *of the Judicature Act*, 1873.

Appeal from an order of the Queen's Bench Division striking a solicitor off the rolls for misappropriation of money.

The solicitor appealed.

Wills, Q.C. (with him *Hollams*), for the Law Society, took a preliminary objection. —No appeal lies from such an order as this, for, by section 47 of the Judicature Act, 1883, no appeal lies from any judgment of the High Court in any criminal cause or matter, and this is such a matter. In *Oliver* v. *Lawrence* (1) and *In re Gellibrand* (2) proceedings such as these were held to be criminal proceedings.

[FRY, L.J.—Does the order of the Queen's Bench Division strike the solicitor off the roll of the High Court or off the roll of the Supreme Court?]

* *Coram* Brett, M.R.; Baggallay, L.J.; Cotton, L.J.; Lindley, L.J.; Bowen, L.J., and Fry, L.J.

(1) 2 Str. 946.

(2) 1 Dowl. & Ry. 121.

In re Hardwick, App.

The order strikes him off the roll of the Supreme Court, for there is, since the Judicature Act, but one roll.

[BRETT, M.R.—The roll has been brought into Court, and it is the roll of the solicitors of the Supreme Court.]

[FRY, L.J.—The Court of Chancery used to strike solicitors off the roll, but that Court did not possess jurisdiction in criminal matters.]

[BRETT, M.R.—The rule in these cases calls on the solicitor to answer by affidavit the matters alleged. Would such a course be pursued if the proceeding were criminal?]

Crime is an offence against the law punishable by competent authority. Proceedings such as these are not taken for the vindication of private rights; nor will the Court, when such a matter is before it, allow it to be settled by private arrangement between the parties.

3 Edw. 1. c. 29; *Coke's Institutes*, pt. 2, p. 213; *Comyn's Digest* and *Viner's Abridgment*, tit. "Attorney"; *In re Tattersall* (3), *In re Mant* (4), *In re Blake* (5) and *In re Hill* (6) were referred to.

[BRETT, M.R.—In the cases in *Coke* the attorney had been attainted: does that not shew he had been indicted and tried?]

Powell, Q.C. (with him *A. Powell*), for the solicitor, were not called on.

BRETT, M.R.—This case raises a question as to the jurisdiction of this Court in a matter which might in some cases be of vital importance to the members of a great profession; and therefore, although we who heard the argument on the former occasion had not any doubt, we desired to have the authority of a full Court for the decision. I have now to give our judgment, and to say that we, having heard argument on the point, have no doubt on this question of jurisdiction. The whole Court and every member of it is of opinion that the Divisional Court, in exercising this jurisdiction, was exercising a disciplinary jurisdiction over its own officers, and was not exercising a jurisdiction in any criminal cause or matter. We will, therefore, hear this appeal.

The appeal was then heard, and the judgment of the Queen's Bench Division was affirmed.

(3) 26 Solicitor's Journal, p. 645.
(4) 5 Law Times, N.S. 254.
(5) 3 E. & E. 34; 30 Law J. Rep. Q.B. 32.
(6) 30 Law J. Rep. Q.B. 295; Law Rep. 3 Q.B. 543.

Solicitors—Appellant in person; Williamson, for the Incorporated Law Society.

[IN THE COURT OF APPEAL.]

1883. Nov. 3. Dec. 21. } *In re* MILTON, BRADFORD AND OTHERS.*

Practice—Appeal—Costs—Order on Solicitor to pay Costs personally—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Rules of Court*, 1883, *Order LXV. rule* 1.

A solicitor having been adjudged by a Judge at chambers to have taken out a summons without sufficient authority was personally ordered to pay the costs of that summons:—Held (*reversing the judgment of the Queen's Bench Division*), *that such an order is more than an order "as to costs only which by law are left to the discretion of the Court," and therefore that an appeal from such an order, without leave first obtained, is not forbidden by section* 49 *of the Judicature Act*, 1873.

Appeal from the Queen's Bench Division.

The case is reported 52 Law J. Rep. Q.B. 759.

A solicitor named Hare made an application, professedly on behalf of a client, that bills of work done as solicitors should be delivered by certain other solicitors named Bradford, Milton and Farish. The Master thought that Hare had no sufficient authority to make the application, and, in dismissing it, directed that the costs should be paid by Hare personally. From this part

* *Coram* Brett, M.R., and Bowen, L.J.

of the order Hare appealed; but Day, J., at chambers, affirmed the order of the Master. Hare again appealed; but the Divisional Court held that no appeal could be brought in such a case without leave. From this judgment Hare appealed to the Court of Appeal.

Mirams, for the appellant.—An appeal lies in this case, because there could be no discretion in the Judge to order the solicitor to pay the costs personally unless he has first been adjudged guilty of some misconduct; the order therefore determines something besides the question of costs, and the provisions of the Judicature Act, 1873, s. 49, do not apply—*Turner* v. *Hancock* (1), *Witt* v. *Corcoran* (2) and *In re Clements* (3).

Daniel, for Bradford.—This is substantially an appeal "as to costs only which by law are left to the discretion of a Court;" it comes therefore strictly within section 49 of the Judicature Act, 1873 (4).

[BOWEN, L.J.—Is not this order an order made under the general jurisdiction of the Court over solicitors, and not under Order LXV. rule 1 (5), which is in substance the same as Order LV. rule 1, of the rules of 1875? BRETT, M.R.—We will hear at all events the appeal on the merits. We think that the appellant has a right to be heard on the question whether the case is simply one of costs left to the discretion of the Judge; but we will consider the whole case.]

The facts of the case were then heard.

Page and *C. M. Chapman* appeared for other parties.

Cur. adv. vult.

(1) Law Rep. 20 Ch. D. 303.

(2) 45 Law J. Rep. Chanc. 603; Law Rep. 2 Ch. D. 69.

(3) 46 Law J. Rep. Chanc. 375.

(4) 36 & 37 Vict. c. 66. s. 49: "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

(5) Rules of Court, 1883, Order LXV. rule 1: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or Judge. . . ."

BOWEN, L.J. (on Dec. 21), stated the facts of the case, and then proceeded:—Two questions therefore arise on this appeal: the first is, whether an appeal lies in this case at all; and the second is, whether in the circumstances of this case the part of the order appealed from ought to be affirmed or varied. As to the first question, it is argued that the Judge at chambers has a discretion in such a matter as this, and that the case comes within the provisions of section 49 of the Judicature Act, 1873 (4), and of the Rules of Court, Order LXV. rule 1 (5). The Act provides that "no order made by the High Court of Justice or any Judge thereof, by consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order." Rule 1 of Order LXV. provides that "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge."

The respondents argue that the order of the Judge at chambers was an order as to costs within the meaning of those provisions, and within the discretion of the Judge; but we are of opinion that it cannot be said to be within the discretion of the Judge at chambers to punish the solicitor who is the appellant in this case, unless in fact the solicitor was guilty of misconduct in the case. We think that it is necessary that there should be a decision that there has been such misconduct before the jurisdiction claimed can arise, and we think that on such a question and from such a decision there is a right of appeal, and that the solicitor is entitled to shew, if he can, on appeal, that the circumstances of the case do not bring it within the conditions which must exist to give the Judge at chambers that discretion from the exercise of which there is no appeal. The recent case of *In re Hardwick* (6) shews that when a solicitor is accused of misconduct he has a right of appeal from the Divisional Court to this Court. The Master of the Rolls agrees with this judgment.

(6) *Ante*, p. 64.

In re Milton, App.

His Lordship then discussed the facts of the case, and the order of the Judge at chambers ordering Hare to pay certain costs personally was rescinded.

Appeal allowed.

Solicitors—G. S. Hare, in person; James & James, for Farish; Bradford & Thursby, in person.

1883. Dec. 5.

HANSEN *v.* MADDOX. (YEO, *claimant.*)

Practice—Costs—Order LIV. rule 12 (*i*) *—Order LVII. rules* 8, 11 *and* 15*—Interpleader—Jurisdiction of Master.*

On the hearing of an interpleader summons before the Master the plaintiff withdrew his claim, whereupon an order was made barring his claim and directing the defendant in the action to pay the amount claimed to the plaintiff, less his own costs. The plaintiff appealed:—Held, *that the Master had no jurisdiction over the costs of the action, as Order LVII. rule* 15 *only empowered him to deal with the costs of the interpleader proceedings before him, all other costs being by Order LIV. rule* 12 (*i*) *excepted from his jurisdiction. There being no jurisdiction in the Master to deal with the costs of the action, an appeal would lie against his order, notwithstanding section* 49 *of the Judicature Act,* 1873, *and rules* 8 *and* 11 *of Order LVII.*

In this case an action to recover 25*l.* was brought by the plaintiff, who, as agent for a Mrs. Gilchrist, had deposited that sum with the defendant. Yeo, as executor of Mr. Gilchrist, who had, since the deposit, died, claimed the money, and an interpleader summons was taken out, which came on for hearing before the Master. On the hearing Yeo withdrew his claim, whereupon the Master ordered the claim to be barred, and that the defendant pay the 25*l.* to the plaintiff, after deducting his (defendant's) costs therefrom. These costs were taxed at 8*l.* The plaintiff appealed, but Field, J., held that the Master's decision was final; and this was a further appeal from the Judge at chambers to the Divisional Court.

R. G. Glenn, for the plaintiff.—The Master had no jurisdiction over the costs of the action, but only over the costs of the proceedings before him. The costs of the action come within Order LIV. rule 12 (*i*), and are excepted from the Master's jurisdiction.

Lawrance, Q.C., for the defendant.—This is an appeal as to costs only, and cannot be heard. But the order was right and within the Master's jurisdiction—*Searle & Co.* v. *Matthews; Fox, claimant* (1).

[DAY, J.—That is only where there is a trial of the issue.]

There is no appeal as to facts by Order LVII. rules 8 and 11. The Master's decision is final, and these are costs within rule 15 of Order LVII. which he is empowered to deal with.

Glenn, in reply.—The Master can only try interpleader by consent, and it is only such costs that he can deal with. He cannot deal with the costs of the action under rule 15 of Order LVII.

DAY, J.—I am of opinion that the plaintiff is entitled to relief, and on the merits there has clearly been a miscarriage of justice while the present order stands. [The learned Judge recapitulated the facts as above.] It is said that there can be no appeal as to costs, and that this is nothing more than such an appeal. But the Rules of 1883, Order LIV. rule 12 (*i*) and Order LVII. rule 15, shew that the Master exceeded his jurisdiction in dealing with the costs of the action. He could deal with the costs of the interpleader, but not of the action. Therefore this order must be set aside, with costs.

SMITH, J.—The defendant was merely a stakeholder, and so soon as Yeo abandoned his claim the plaintiff was entitled to have his 25*l.* from the defendant at once. The Master ordered that the defendant's costs of defending the action shall be deducted from the 25*l.*; and clearly this was a wrong

(1) W.N. 1883, p. 176.

order on the facts. The only difficulty suggested is that there is no appeal, and that by Order LVII. rules 8 and 11 the Master's decision was final. I think, however, that that only applies where the Judge has dealt summarily with the interpleader, whereas this was not the hearing of the issue. Then it is said that this is an appeal only as to costs; but I think that there was no jurisdiction here to give the costs at all, which disposes of that objection. Awarding costs is excepted by Order LIV. rule 12 (*i*) from the Master's power, and Order LVII. rule 15 only gives jurisdiction over the costs of the interpleader, not of the action.

Appeal allowed.

Solicitors—Wm. Stollard, for plaintiff; Dod & Longstaffe, for defendant.

[IN THE COURT OF APPEAL.]

1883. Dec. 12.

GRANT *v.* EASTON.*

Practice—Action on Foreign Judgment—Debt arising out of Contract—Order III. rule 6*—Leave to sign Judgment—Order XIV. rule* 1.

An action upon a foreign judgment is an action of debt arising out of a contract within the meaning of Order III. rule 6*, in which leave may be given to the plaintiff under Order XIV. to sign final judgment for the amount claimed.*

Hodsoll *v.* Baxter (28 Law J. Rep. Q.B. 61) *followed.*

Appeal by the defendant from a decision of the Divisional Court.

In July, 1883, the plaintiff obtained a judgment for more than 2,000*l.* against the defendant at Cairo.

An action having been brought in this country for the amount of the judgment so recovered, a Master made an order under Order XIV. for final judgment for the amount claimed. The Divisional Court (Grove, J., and Mathew, J.) affirmed the decision of Butt, J., who refused to set aside the Master's order.

The defendant appealed.

Rolland, for the defendant.—A foreign judgment does not come within the provisions of Order XIV. An order for final judgment can only be made where the writ is specially indorsed under Order III. rule 6. There must be a debt arising out of a contract express or implied, or arising in one of the ways stated in the rule, to entitle a plaintiff to an order for final judgment under Order XIV. The process under that order is of a summary nature, and abridges the *prima facie* right which a defendant has to defend the action. The operation of rule 6 ought not therefore to be extended beyond its express terms. A foreign judgment is not within any of the cases enumerated in that rule. The case of *Hodsoll* v. *Baxter* (1), by which the Court below felt bound, is distinguishable. That was a decision upon the words of the Common Law Procedure Act, 1852, s. 25, and no provision was made by that Act whereby a plaintiff could summarily obtain final judgment. Moreover, the action was upon a judgment obtained in this country, and not upon a foreign judgment.

Petheram, Q.C., and *Henry*, for the plaintiff, were not called upon to argue.

BRETT, M.R.—The words of Order III. rule 6, are substantially the same as those of the Common Law Procedure Act, 1852, s. 25, and were evidently copied from that section. The question is, whether or not the words of that rule are to have the same effect as those of the section. If they are, then the effect of the section has been decided by a Court of error in the case of *Hodsoll* v. *Baxter* (1). If the meaning of rule 6 is the same as that of the section, then the Court is bound by that decision to put the same interpretation upon the rule; and even if there had been no such decision I should have come to the same conclusion. An action upon a foreign judgment has always been treated in England as an action of debt. It seems to

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) E., B. & E. 884; 28 Law J. Rep. Q.B. 61.

Grant v. Easton, App.

me therefore to come within the terms of rule 6, and an order for judgment under Order XIV. can therefore be made. What hardship is there in that? It was suggested that there was a difference with regard to an action on a foreign judgment and a home judgment, because a defence might be put into a foreign judgment. But there is nothing in the rule which prevents a defence being raised. The action on a foreign judgment was an action of *assumpsit*, and the debt arises upon the implied obligation to pay the amount of the judgment. I think that an order for judgment can be made under Order XIV. in the case of a foreign judgment as well as in that of a home judgment.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Stocken & Jupp, for plaintiff; West, King, Adams & Co., for defendant.

[IN THE COURT OF APPEAL.]

1883. Dec. 10, 11, 21. THE GREAT NORTHERN RAILWAY COMPANY *v.* TAHOURDIN AND COMPANY.*

Railway—Dock Company with Railway—Rolling Stock and Plant—Liability of to be taken in Execution—Rights of Debenture Holders and Execution Creditor—30 & 31 *Vict. c.* 127. *ss.* 3, 4 *and* 23; 38 & 39 *Vict. c. ccvii.*

A company was constituted by private Acts of Parliament for the purpose of making a dock, with a short line of railway to connect the dock with other railways not belonging to the dock company: —Held (*affirming the judgment of the Queen's Bench Division*), *that the undertaking was a railway within* 30 & 31 *Vict. c.* 127. *s.* 3, *which defines a company for the purposes of that Act to be a railway company—that is, a company constituted by Act of Parliament for the purpose of constructing a railway, either alone or in conjunction with any other purpose—and that lifting engines, cranes, and engines for supplying power to the cranes belonging to the company were rolling stock or plant within section* 4 *of that Act, and so not liable to be taken in execution by a judgment creditor.*

Appeal from the judgment of the Queen's Bench Division granting an interim injunction restraining the defendants from proceeding to sell, under an execution, certain chattels belonging to the Sutton Bridge Dock Company. This company was incorporated by certain private Acts of Parliament (1), and the defendants did work

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) The Sutton Bridge Dock Act, 1875 (38 & 39 Vict. c. ccvii.):—

"Whereas the making and maintaining of a dock and other works on the river Nene at Sutton Bridge . . . . with a short line of railway to connect the dock with the railways at Sutton Bridge would be of public and local advantage: And whereas plans and sections of the proposed dock, works and railway, shewing the line and levels thereof . . . . have been deposited, ... be it enacted—"

Sect. 3: "In construing, in connection with this Act, Part I. of the Railways Clauses Act, 1863, the words 'work' and 'railway' shall be taken to mean the dock and other works connected therewith, as well as the railway."

Sect. 4: "In this Act . . . . the expression 'railway' means the railway and the works connected therewith by this Act authorised to be constructed . . . ."

Sect. 6: "Subject to the provisions of this Act the company may make and maintain . . . . the dock cut and railway hereinafter described. . . . . The dock cut and railway hereinbefore referred to and authorised by this Act are . . . . a short line of railway 3 furlongs 8 chains in length commencing by a junction with the goods lines at Sutton Bridge railway station . . . ."

Sect. 28: "The company may create and issue debenture stock, subject to the provisions of Part III. of the Companies Clauses Act, 1863; but, notwithstanding anything therein contained, the interest of all debenture stock at any time created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time granted by the company, and shall have priority over all the principal moneys secured by such mortgages."

Sect. 50: "The company may demand and take, in respect of the railway and the traffic thereon, the like tolls, fares, rates and charges

for the company as solicitors for which they were unable to obtain payment. They therefore brought an action for the amount due, obtained judgment, and issued execution on the 5th of November, 1883.

On the 7th of November, the plaintiffs, who are debenture-holders in the Sutton Bridge Dock Company, applied for an interim injunction restraining the defendants from selling under the execution until the trial of an action for a perpetual injunction, on the ground that they were debenture-holders in the Sutton Bridge Dock Company, and that the things seized, consisting of a lifting engine, certain cranes, and a steam engine not a locomotive, were rolling stock and plant, and therefore protected from execution by 30 & 31 Vict. c. 127 (2).

The Queen's Bench Division granted an interim injunction. The defendants appealed, and on the hearing of the appeal it was suggested by the Court, and agreed to by the parties, that the judgment of the Queen's Bench Division should be treated as a final judgment, and that the Court of Appeal should decide whether the plaintiffs were entitled to a perpetual injunction.

Waddy, Q.C., and *S. Will*, for the defendants.—The Sutton Bridge Dock Company is not a railway company, but a dock company, with a railway ancillary to it; 30 & 31 Vict. c. 127 (2) therefore does not apply.

The things seized are not railway plant but dock plant. Besides, the plaintiffs are not entitled to maintain this action, for debenture bonds or stock only give the owners thereof a right to the revenues arising from an undertaking, and not a right to the undertaking itself.

Read, Q.C., and *C. Dodd*, for the plaintiffs.—The mortgage debenture gives the plaintiffs, by its very form, a charge on the undertaking as a going concern, so that the plaintiffs are entitled to this injunction apart from any statute. Even if this be not so, still 30 & 31 Vict. c. 127. s. 23 (2), gives the plaintiffs priority. The Sutton Dock Company is both a dock company and a railway company, so that 30 & 31 Vict. c. 127 applies to the undertaking.

[BRETT, M.R.—We are of opinion that the Sutton Company is a railway company within 30 & 31 Vict. c. 127; but we wish to hear argument on the question whether all the things seized can be said to be railway rolling stock or plant.]

All the things seized are such plant: the cranes run on wheels along the railway, the coal tip is at the end of the railway, and the engine which supplies power is part of the railway material; but if 30 & 31 Vict. c. 127. s. 23 (2), be considered, it is immaterial whether the things seized are railway plant or not. A mortgagee cannot interfere so as to prevent the thing mortgaged from being kept as a going concern, and much less can a mortgagor. A mortgage of an undertaking gives a charge over specific property; and even if the specific property does not pass, still the plaintiffs have a charge on the property of which the

as by the Peterborough, Wisbeach and Sutton Railway Act are authorised. . . ."

The Sutton Bridge Dock Act, 1876 (39 & 40 Vict. c. lxxxviii.):—

"Whereas it is expedient that the company be empowered to make and maintain the railway by this Act authorised, to connect their dock and works with the Norwich and Spalding Railway, be it enacted that—"

Sect. 4: "Subject to the provisions of this Act, the company may make and maintain . . . . the railway hereinafter described, with all proper stations, sidings, approaches, works and conveniences connected therewith. . . ."

(2) 30 & 31 Vict. c. 127. s. 3: "In this Act the term 'company' means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining or working a railway (either alone or in conjunction with any other purpose)."

"Protection of Rolling Stock and Plant."

Sect. 4: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway, or any part thereof, is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act. . . ."

Sect. 23: "All money borrowed or to be borrowed by a company on mortgage or bond or debenture stock under the provisions of any Act authorising the borrowing thereof, shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act. . . ."

private Act shews the undertaking to consist, so that they have all the rights of ordinary mortgagees, save so far as such rights have, with regard to such a subject-matter as this, been limited by statutory enactment or judicial decision. The cases decided upon bills of sale shew how a floating security may be affected by a charge, and those principles apply to this case.

S. Will, in reply.

The following cases were cited and discussed:—*In re The Exmouth Dock Company* (3), *Legg* v. *Mathieson* (4), *Widy* v. *The Mid Hants Railway Company* (5), *Gardner* v. *The London, Chatham and Dover Railway Company* (6), *In re The New Clydach Company* (7), *In re The Florence Land Company* (8), *The Yorkshire Railway Waggon Company* v. *Maclure* (9), *The Midland Waggon Company* v. *The Potteries Railway Company* (10), *In re The Manchester and Milford Railway Company* (11), *Russell* v. *The East Anglia Railway Company* (12), *Moor* v. *The Anglo-Italian Bank* (13), *Furness* v. *The Caterham Railway Company* (14), *The National Mercantile Bank* v. *Hampson* (15), *Taylor* v. *McKeand* (16), *Payne* v. *Fern* (17) and *In re The Panama Company* (18).

Cur. adv. vult.

(3) 43 Law J. Rep. Chanc. 110; Law Rep. 17 Eq. 181.
(4) 2 Giff. 71; 29 Law J. Rep. Chanc. 385.
(5) 16 W.R. 409.
(6) 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.
(7) Law Rep. 6 Eq. 514.
(8) 48 Law J. Rep. Chanc. 137; Law Rep. 10 Ch. D. 530.
(9) 51 Law J. Rep. Chanc. 857; Law Rep. 21 Ch. D. 309.
(10) 50 Law J. Rep. Q.B. 6; Law Rep. 6 Q.B. D. 36.
(11) 49 Law J. Rep. Chanc. 365; Law Rep. 14 Ch. D. 645.
(12) 6 Rail. Cas. 501; 3 Mac. & G. 125.
(13) Law Rep. 10 Ch. D. 681.
(14) 27 Beav. 358; 27 Law J. Rep. Chanc. 771.
(15) 49 Law J. Rep. Q.B. 480; Law Rep. 5 Q.B. D. 177.
(16) 49 Law J. Rep. C.P. 563; Law Rep. 5 C.P. D. 358.
(17) 50 Law J. Rep. Q.B. 446; Law Rep. 6 Q.B. D. 620.
(18) 39 Law J. Rep. Chanc. 482; Law Rep. 5 Chanc. 318.

BRETT, M.R. (on Dec. 21).—In this case the plaintiffs obtained an *interim* injunction against the defendants to prevent them from enforcing by execution a judgment which they had obtained against a company known as "The Sutton Bridge Dock Company." There was then a motion in the Divisional Court to set aside that interim injunction; but the Divisional Court refused that motion. An appeal was then brought here, and it was agreed on both sides that for the benefit of all parties the order of the Divisional Court should be treated as an order for a perpetual injunction, and that the question whether a perpetual injunction ought to be granted or not should be settled on this appeal.

The defendants obtained a judgment against the Sutton Bridge Dock Company for money due to them, on which they issued execution. The plaintiffs are owners of debenture stock in that company—that is, they hold an instrument by which the undertaking of that company is mortgaged to them. The things seized by the execution creditors were a lifting engine, certain cranes, and a fixed engine which supplied power to the other engine, to the dock gates, and to the cranes.

Several points have been argued upon this appeal: it was questioned whether the Sutton Dock Company was a railway company within the meaning of 30 & 31 Vict. c. 127 (2); and, further, it was argued that even if it were such a company, still there was a question whether the things seized were rolling stock or plant within section 4 of that Act. Other points were also argued: it was said on behalf of the plaintiffs that they were mortgagees of the property seized, and therefore that the property in the rolling stock and plant was in them, so that it was not liable to seizure at the hands of execution creditors; and, further, even if that were not so, yet that section 23 of 30 & 31 Vict. c. 127 (2) protected the interests of the plaintiffs, inasmuch as they are mortgagees of the undertaking, having, as such, an equitable charge over the property seized, and therefore that they are entitled within section 23 (2) to priority over the defendants. These two latter points were not decided in the Divisional Court,

for that Court held that the Sutton Bridge Dock Company was a railway company within 30 & 31 Vict. c. 127 (2), and that the things seized were rolling stock or plant within section 4 of that statute. I am of opinion that the judgment of the Divisional Court was right, regard being had to the grounds upon which it rested. The first question which arises is, whether the Sutton Bridge Dock Company is a railway company within 30 & 31 Vict. c. 127. s. 3 (2). That section says that—"In this Act the term 'company' means a railway company—that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining or working a railway (either alone or in conjunction with any other purpose)." Now this company may be described as being mainly a dock company; but its private Acts enable it to construct a railway as well as a dock. The argument on behalf of the execution creditors is that the railway is only ancillary to the dock, and therefore that the company is wholly a dock company, and not in any sense a railway company.

I do not feel able to discuss that argument: the statute does not contain the word "ancillary," but it speaks of a company formed for working a "railway either alone or in conjunction with any other purpose." Now this company is within the terms of that Act; it is a company "constituted by Act of Parliament," and it is enabled to construct, maintain or work a railway in conjunction with other purposes; so that, even if the railway be ancillary to the main object of the company, still it comes within the provisions of the Act, and the addition or use of such an epithet as "ancillary" cannot take it out of the statute.

Then comes the question, whether all or any of the things seized are rolling stock or plant "used or provided" by the "company for the purposes of the traffic on their railway or of their station or workshops." This is a question of fact, and I am of opinion that all the three things seized are railway plant, and that they are all protected against execution at the hands of judgment creditors.

The Divisional Court was of this opinion also, and, as we agree with them, it appears to me to be unnecessary to go into any further discussion. We could not decide any of the other points raised so as to give a decision which should bind this Court in any other case, and it would therefore be wrong of us to give any opinion on those points. The appeal fails; the judgment of the Divisional Court must be affirmed, and the plaintiffs are entitled to a perpetual injunction.

BAGGALLAY, L.J.—I am of the same opinion. If the private Acts of the Sutton Bridge Dock Company are examined, it is clear that the company is a railway company within 30 & 31 Vict. c. 127. s. 3 (2), and that the chattels seized are railway plant, and, as such, are protected by section 4 from seizure by execution creditors. That is sufficient to support an application for a perpetual injunction, and it is unnecessary to consider any other question.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed; judgment for perpetual injunction.

Solicitors—Tahourdins & Co., for appellants; Nelson, Barr & Nelson, for respondents.

[IN THE COURT OF APPEAL.]

1883. Nov. 3, 5. } THE QUEEN *v.* THE RECORDER OF SHEFFIELD.

Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *ss.* 150 *and* 268—*Apportionment of Expenses of Work in Street—Summary Proceedings—Jurisdiction of Justices of Peace—Appeal to Local Government Board.*

[For the report of the above case, see 53 Law J. Rep. M.C. 1.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. Nov. 15, 22. Dec. 19.

FRASER AND COMPANY *v.* EHRENSPERGER AND ANOTHER.*

Arbitration—Contract containing provision for—Appointment of Arbitrator by one party—Refusal to appoint by the other—Revocation of Authority—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 13.

Where a reference is made to two arbitrators, one to be appointed by each party, and one party fails to appoint an arbitrator, the other party may, by section 13 *of the Common Law Procedure Act*, 1854, *after notice, appoint the arbitrator nominated by him to be sole arbitrator in the reference; but that section does not prevent the party who has failed to appoint from revoking the authority of such sole arbitrator, and from withdrawing from the reference before the award is made, for the sole arbitrator becomes in such a case the mandatory of both parties, and either can within the proper time revoke his authority.*

In re Rouse and Meier (40 Law J. Rep. C.P. 145) *approved.*

Application for an order for the payment by Messrs. Ehrensperger & Co. to Messrs. Fraser & Co. of a sum of 1,239*l.*, in pursuance of an award made by a Mr. Arthur Frederick Williams. The application at chambers had been dismissed by the Master, and, on appeal, had been referred to the Court from chambers by Field, J.

By a contract dated the 19th day of February, 1883, Fraser & Co. bought of Ehrensperger & Co. a cargo of rice, per ship *Hakon Adelstein*, expected to sail from Rangoon in March, 1883. The cargo was not shipped, and Fraser & Co. demanded an arbitration in respect of the damages for non-delivery of the cargo, under the following clause in the contract:—

"Any dispute arising on this contract, except on quality as already provided for in clause 12, to be referred for settlement to the arbitration of two London brokers or their umpire, one nominated by the sellers, and the other by the buyers, each party having the right of rejecting one nominee."

Ehrensperger & Co. disputed their liability—first, on the ground that they had signed the contract as agents only; and secondly, that the sale, by the terms of the contract, was conditional on the arrival of the cargo, and that the cargo had not arrived. They proposed to Fraser & Co. to state a Special Case for the opinion of the Court. The proposal was refused, and on the 31st of May, 1883, a notice was served on Ehrensperger & Co., that Fraser & Co. had appointed Mr. A. F. Williams as arbitrator; and Ehrensperger & Co. were informed that, if they failed to make an appointment under the contract, the arbitrator named by Fraser & Co. would proceed alone, under section 13 of the Common Law Procedure Act, 1854. On the 4th of June the following notice was sent to Fraser & Co.:—

"We, Ehrensperger & Eckenstein, of 17 Water Street, Liverpool, do hereby revoke, annul and make void all the power and authority which, by an agreement in writing dated the 19th day of February, 1883, made between us and Messrs. Fraser & Co. of London, respecting a cargo of rice new crop Agalsein per *Hakon Adelstein*, were given to the arbitrators to be appointed to award and determine on any dispute arising on the said agreement. And whereas, by a notice dated the 31st day of May last, the said Messrs. Fraser & Co. informed us that they appointed Arthur Frederick Williams, of the Commercial Sale Rooms, Mincing Lane, London, broker, to be an arbitrator under the said agreement for the purpose of settling an alleged dispute, and thereby required us to appoint an arbitrator to act with the said Arthur Frederick Williams in the said intended arbitration; now we, the said Ehrensperger & Eckenstein, do hereby discharge and prohibit the said Arthur Frederick Williams from making any award or from any further proceeding in the said intended arbitration.

(Signed)

"Ehrensperger & Eckenstein."

On the same day the following notice was sent by Ehrensperger & Co. to Mr. Williams:—

"Sir,—We hereby give you notice that

* *Coram* Brett, M.R., and Bowen, L.J.

by a writing under our hand, dated this day, we have revoked, annulled and made void your authority as arbitrator; and we hereby discharge and prohibit you from further proceeding in the matter of an intended arbitration concerning alleged disputes between us and Messrs. Fraser & Co., of 40 Mincing Lane, London, arising on a contract of the 19th of February, 1883, relating to a cargo of rice per *Hakon Adelstein*, dated the 4th day of June, 1883.

(Signed)

"Ehrensperger & Eckenstein."

On the 21st of June Fraser & Co. served a further notice on Ehrensperger & Co., that, in consequence of their default, Mr. Williams would act as sole arbitrator; and on the next day a notice was served on Mr. Williams by Ehrensperger & Co. reminding him of the previous notice, and repeating the prohibition.

Mr. Williams proceeded with the reference *ex parte*, and awarded to Fraser & Co. 1,239*l*. The submission was afterwards made a rule of Court, and an application was made at chambers to enforce the award, and referred to the Court as above stated.

Finlay, Q.C., and *R. V. Williams*, in support of the application.

W. H. Butler, contra.

The arguments and authorities cited sufficiently appear in the judgment.

Cur. adv. vult.

The judgment of the Court (Grove, J., and Mathew, J.), was (on Nov. 22) delivered by

MATHEW, J. [after stating the facts as above set out, his Lordship proceeded as follows:]

It was contended for Ehrensperger & Co. that the revocation of the authority of Mr. Williams was an answer to the application. On the other hand, it was argued that, inasmuch as Mr. Williams had been appointed by Fraser & Co., his authority could not be revoked by Ehrensperger & Co., for whom it was said he was in no sense an agent; and, further, that any right which Ehrensperger & Co. may have had at common law to revoke the authority of the arbitrator, was controlled by section 13 of the Common Law Procedure Act, 1854, which gave the Court the power of revocation.

We are of opinion that we are bound by the decisions on the subject, more especially by the judgment of the Court of Common Pleas in *In re Rouse and Meier* (1), and must hold that Ehrensperger & Co. had the right to revoke the authority of Mr. Williams to act as arbitrator.

It was said that he was the agent of those who appointed him, and therefore that they alone could put an end to his authority. But the right of Mr. Williams to act as arbitrator was derived from the agreement of both parties, and was therefore, as it seems to us, revocable at the option of either. Then, with respect to the supposed effect of section 13 of the Common Law Procedure Act, 1854, upon the right to revoke a submission to an arbitrator who derives his power under the section from the default of one party to the submission, it is sufficient to refer to the case of *Gumm* v. *Hallett* (2), which decides that section 13 does not apply when, as in this case, the submission is to arbitrators and their umpire.

Apart from this authority, which is binding on us, the cases seem to shew that the Common Law Procedure Act, 1854, was not intended to extend the operation of 3 & 4 Will. 4. c. 42. s. 39, or to take away the common law right to revoke the appointment of an arbitrator in a case not within the provisions of the latter statute —see *Mills* v. *Bayley* (3), *In re Rouse and Meier* (1), *Thompson* v. *Anderson* (4) and *Randell* v. *Thompson* (5).

The learned counsel for Fraser & Co. relied on the case of *Piercy* v. *Young* (6), and argued that what had been attempted in this case was to revoke the agreement to refer; and if this were so, it is clear that no such revocation would be operative. But we are of opinion that what was done by Ehrensperger & Co. was to revoke the

(1) 40 Law J. Rep. C.P. 145; Law Rep. 6 C.P. 212.

(2) 41 Law J. Rep. Chanc. 514; Law Rep. 14 Eq. 555.

(3) 2 Hurl. & C. 36; 32 Law J. Rep. Exch. 179.

(4) 39 Law J. Rep. Chanc. 468; Law Rep. 9 Eq. 523.

(5) 45 Law J. Rep. Q.B. 713; Law Rep. 1 Q.B. D. 748.

(6) Law Rep. 14 Ch. D. 200.

submission to Mr. Williams; and, as is pointed out by the late Master of the Rolls in *Piercy* v. *Young* (7), while a general agreement to refer cannot be got rid of by revocation, a particular submission may be revoked in cases not within the operation of 3 & 4 Will. 4. c. 42. s. 39. This application must be refused, but without costs.

Order refused.

The plaintiffs appealed.

Finlay, Q.C., and *R. V. Williams*, for the appellants.—This appeal raises the question, whether in a case where a sole arbitrator has been appointed under the Common Law Procedure Act, 1854, s. 13, in default of appointment by the other party, the party who fails to nominate an arbitrator can revoke the authority of the sole arbitrator to act for him. At common law any one could, before award made, revoke the authority of an arbitrator; then by the conjoint effect of 9 & 10 Will. 3. and 3 & 4 Will. 4. c. 42, where a reference is made in pursuance of a submission which contains an agreement that it shall be made a rule of Court, it cannot be revoked without the leave of the Court; and then came the provisions of the Common Law Procedure Act, 1854, of which Act section 13 applies to this case. Under that section, a sole arbitrator, acting as the arbitrator in this case has acted, derives his authority from that statute and that section, and not from any mandate of the parties: so that the parties affected by it cannot revoke his authority, but the Court can revoke the appointment if it thinks fit: and the proper remedy of a party who may be aggrieved is pointed out by the latter part of the section. If it be thought necessary, this Court can review the decision given in *In re Rouse and Meier* (1), and adopt the reasoning of Bovill, C.J., which establishes that section 7 of the Common Law Procedure Act, 1854, makes section 17 of the same Act applicable to such an arbitration as this; but if that view be not adopted, then it is submitted that the present case can be distinguished from *In re Rouse and Meier* (1), for that case was not a case of a sole arbitrator under section 13, but a case of an umpire whose authority had its origin in the appointment of the arbitrators; further, that case turned upon another section of the statute, and the provisions of section 17 are different from those of section 13. Sections 11, 12 and 13 belong to a group of sections headed "Amendments in the Law of Arbitration," and the result of section 13 is that there is no appointment by a party, and therefore there can be no revocation by a party; the appointment is statutory, and any revocation must be made by the Court.

Vynior's Case (8), *Mills* v. *Bayley* (3), *Randell* v. *Thompson* (5), *Gumm* v. *Hallett* (2) and *Piercy* v. *Young* (6) were cited.

Bigham, Q.C., and *W. H. Butler*, for the defendants, were not called on.

BRETT, M.R.—In this case a dispute arose between the two parties to a contract. That contract contained a clause providing for an arbitration under the Common Law Procedure Act, 1854, in case such a dispute should arise.

Section 13 of that Act is the section which applies to this case, and that section provides that when the reference is to two arbitrators, as was the case here, if, on such a reference, one party fail to appoint an arbitrator—and that is what happened in this case—the party who has appointed an arbitrator may give the other party notice, and may then appoint the arbitrator to act as sole arbitrator in the reference. This was done in this case, and the sole arbitrator heard the evidence; but before he made his award, the defendants, who had failed to appoint an arbitrator, revoked the authority of the sole arbitrator, and gave him notice not to proceed with the reference. The arbitrator, however, did proceed, and made what he intended to be an award, and it is this award which the Court is now asked to enforce. The question is, whether such an award is an award in law, for if the submission was legally revoked, then there is no award which the Court can enforce.

It was urged on behalf of the appellants that as section 13 of the Common Law Procedure Act, 1854, enables one party to a dispute to name a sole arbitrator, therefore

(7) Law Rep. 14 Ch. D. at p. 203.

(8) 8 Co. Rep. 81 B.

the party so nominated is not the mandatory of both parties, but only of the one who nominates him, and that the person so named is in fact a judge and not an arbitrator, that the matter brought before him is brought for judicial decision, that what is given is a judgment, and that the authority of this judge cannot be revoked. I cannot think that this argument ought to prevail. Judges are well known persons, with well known characters and positions; they are nominated in the authorised way to act as judges between all suitors; they are not persons nominated to decide matters between two particular persons or sets of persons. An arbitrator, however, is a person who is appointed by agreement to settle matters in dispute between two specified parties; an arbitrator is clearly not a judge, and he is on the contrary a mandatory, his authority issuing entirely from those persons who agree to give that authority to him. It has not been denied that if each of two parties appoints an arbitrator, either of them can withdraw the mandate from his own arbitrator; but it is argued that in a case such as the present, the provisions of the Common Law Procedure Act, 1854, s. 13, alter the law. That must depend upon the question whether an arbitrator appointed under that Act is an arbitrator having the attributes of an arbitrator, or whether he is something else, and whether or not he is subject to the usual incidents which attach to an arbitrator. I am of opinion that he is an arbitrator appointed to act between the parties in the manner in which any other arbitrator would act. The Common Law Procedure Act, 1854, only interferes with the manner of his nomination, and therefore his authority may be revoked; and he is, I think, a statutory mandatory appointed by statute to act for both parties, and therefore either can revoke his authority within the proper time. It has been said that the judgment of Lord Chief Justice Bovill in *In re Rouse and Meier* (1) is correct, and that the reasoning of that judgment supports the case of the appellants, and it is said that section 7 of the Common Law Procedure Act, 1854, incorporates the provisions of section 39 of 3 & 4 Will. 4. c. 42 in such a way that neither party can revoke the authority of the arbitrator. Without doubt the appellants must succeed if the view taken by Lord Chief Justice Bovill be correct. We can, it is truly said, review the judgment of the Court in *In re Rouse and Meier* (1); but I own that, even if I dissented from the judgment of the Court in that case, I should hesitate to overrule it. That judgment contains a decision on a rule of procedure which was brought thus before the public, the profession and the Legislature several years ago; it has been acted on, the subject has been dealt with in statutes and rules of Court, and yet the rule has not been altered or abrogated. I maintain, however, the opinion which I expressed in that case, and I think that section 7 applies only to what the arbitrator can do and what the Court can do, and not to what the parties may do, and that it does not incorporate into the Act the enactments of the earlier statute affecting the power of the parties to revoke the arbitrator's authority. It has been further urged that section 13 of the Act of 1854 prevents the parties from revoking the authority of the arbitrator; but I adopt the reasoning of the decision in *In re Rouse and Meier* (1), and I think that it is an incident which is affixed to the appointment of an arbitrator that he is a mandatory, and that where he is appointed to act between two parties he is the mandatory of both: so that before the mandate is completely executed it can be withdrawn and revoked, unless there is some clear legislative enactment which takes this power away from those who confer the authority on the arbitrator. I find no such words in section 13 of the Common Law Procedure Act, 1854, and I am therefore of opinion that that section does not take the power away. I think that the cases referred to support this view, which is that adopted in the judgment of the Divisional Court, and this seems to be especially true of the judgment of the late Master of the Rolls in *Piercy* v. *Young* (6).

BOWEN, L.J.—I am of the same opinion, and I agree that this appeal must fail. At common law the case is clear, and I

think that an arbitrator appointed under the Common Law Procedure Act, 1854, has not a statutory and indefeasible function to bind both parties by his award, if either of them revokes the authority in time. Section 13 does not give him this, although it makes him in certain circumstances the mandatory of both parties. Nor does the latter part of the section alter his position; that provision enables a party to go to the Court in certain circumstances without attempting to revoke the submission. The judgment of the Court in *In re Rouse* and *Meier* (1) shews that the provisions of section 39 of 3 & 4 Will. 4. c. 42 do not govern such a case as this.

Appeal dismissed.

Solicitors—Linklater & Co., for appellants; Sharpe, Parkers & Co., agents for Jevons, Ryley & Style, Liverpool, for respondents.

1883. Dec. 10.

SHAPCOTT v. CHAPPELL.

Practice—Appeal from County Court—Order XXXIX. rule 6 *—Improper Rejection of Evidence—No New Trial where no Miscarriage—County Courts Act*, 1875 (38 *&* 39 *Vict. c.* 50), *s.* 6.

Order XXXIX. rule 6 *applies to applications for new trials from a County Court under section* 6 *of* 38 *&* 39 *Vict. c.* 50. *Where, therefore, evidence had been improperly rejected by the County Court Judge, but the Court, on the hearing of the motion, were of opinion that no miscarriage of justice had been thereby occasioned, a new trial was refused.*

This was a rule for a new trial of an action in the Westminster County Court, on the ground of the improper rejection of evidence at the trial. The action was, under the Employers' Liability Act, brought by the widow of a man who was killed while in the employ of the defendant, by reason, as was alleged, of the scaffolding on which he was at work as a mason being defective. The evidence rejected was that of the defendant's solicitor, whom it was proposed to call to contradict one of the plaintiffs' witnesses, who denied having ever said that the scaffold was properly constructed. The County Court Judge gave a verdict for the plaintiff, whereupon the defendant obtained the rule, against which

Kemp, Q.C. (*Proudfoot* with him), now shewed cause.—It may be that the evidence should have been admitted, but it could have had no possible effect upon the verdict; and the Court will not grant a new trial where it is clear that no different result would follow.

Hannen, in support of the rule.—The exclusion of the evidence did seriously affect the defendant's case, who was thereby prevented from discrediting the most important of the plaintiffs' witnesses as to the condition of the scaffold. But, it being admitted that the rejection was improper, the defendant is absolutely entitled to a new trial, because Order XXXIX. rule 6 does not apply to County Court trials. The old rule still applies in County Court actions—*London* v. *Roffey* (1). It is obvious that the other rules of Order XXXIX. could have no application to a County Court, and the order was never intended to apply to any except trials in the High Court.

[STEPHEN, J.—In this rule the reason of the thing would apply, and the words are quite general.]

It might be a very good rule to make with regard to County Court motions; but it is submitted that it was not within the contemplation of the framers of these rules, and not, on the fair construction, within them.

LORD COLERIDGE, C.J., after dealing with the facts, and stating that, in his opinion, there had clearly been no miscarriage, and the verdict could not have been affected by the evidence rejected, proceeded:—Mr. Hannen has brought before us a technical point well worthy of attention, urging that we are not justified in refusing a new trial in a County Court

(1) 47 Law J. Rep. Q.B. 16; Law Rep. 3 Q.B. D. 6.

action, on the ground that there has been no miscarriage of justice, if, in fact, as here, there has been an improper rejection of evidence. He argues that Order XXXIX. rule 6 does not apply. I agree that, in terms, it does not apply. I agree that many of the rules of that order cannot have any application to the County Court. I agree also, if I may say so, entirely in the judgment of the late Lord Chief Justice in *London* v. *Roffey* (1); but I come to the conclusion that a fair and reasonable interpretation of this rule 6 will bring this case within the purview of it, and for this reason: This is a County Court action, but the mode in which County Court procedure is to be set right, if it be wrong in law, is by means of an appeal to the High Court; and when the case comes before us in the High Court, we are, I think, to be guided by the rules which guide and direct this Court; and we are directed by rule 6 not to grant a new trial in cases where, in our opinion, no substantial wrong or miscarriage has been occasioned. It is true, perhaps, that, in the first intention of the rules, High Court actions only were contemplated; but if the rule is in general terms, and it will apply to proceedings which are brought by other statutes into this Court, I see no reason for not so applying it. It is convenient that it should apply, but I protest against being supposed to be deciding upon convenience. I have stated why I think, on fair construction, it does apply; and I should not be disposed to go out of my way to give effect to a highly technical objection which was removed by the Judicature Act. I decide as I do because, in this Court, we are guided by the rules of this Court, where they are applicable. This rule must therefore be discharged.

STEPHEN, J.—I am of the same opinion, on both points. On the technical objection I quite admit that there is much to be urged; but I think that, although several rules of Order XXXIX. obviously apply to actions in the superior Court only, yet those which deal with general principles should not be limited to superior Court actions. These words clearly cover County Court actions, and it would be extremely injurious to narrow their beneficial operation so as to exclude motions for new trials in County Court actions.

MATHEW, J.—I am of the same opinion on both points. As bearing on the second, I may remark that a decision has been already given in which I fully concur, that the words "every application for a new trial shall be by notice of motion," to be found in rule 3 of Order XXXIX., apply to the County Courts.

The Act of 1875 (38 & 39 Vict. c. 50) had pointed out a way of bringing an appeal from a County Court by motion, and accordingly a rule *nisi* used to be moved for under section 6 of that Act. Then came the new rules of 1883, which said that instead of a rule *nisi* application should be by notice of motion; and this, as I think very sensibly, was held to include County Court new trials. The words in rule 6 of the same order are equally wide and general, and I think that the provisions in that rule also apply to applications for a new trial from a County Court.

Rule discharged.

Solicitors—J. P. Godfrey, for plaintiff; John Mackrell & Co., for defendant.

1883. Nov. 28.

PALMER *v.* JOHNSTON.

Vendor and Purchaser—Particulars of Sale—Error in Description—Misrepresentation of Value—Compensation for Error after Conveyance taken.

The particulars of freehold property put up for sale by auction misstated the net rental, and the purchaser, relying on the accuracy of the particulars, gave a sum higher than the real value. His contract contained a stipulation for compensation being made in case any error in the particulars should be discovered, but he did not discover this error till after he had paid the full purchase-money, accepted a conveyance and taken possession. He then sought to recover from the vendor as damages the amount

which he had been induced to give beyond the real value for the property :—Held, *by* SMITH, J., *explaining* Baker *v.* Jolliffe (52 Law J. Rep. Q.B. 609), ***that, notwithstanding the fact of the conveyance having been executed, the action was maintainable, as the preliminary contract for compensation remained in force.***

Further consideration.

This was an action tried at the Summer Assizes at Nottingham before Smith, J., when, after the jury had found their verdict on the questions of fact submitted to them, the learned Judge reserved for further consideration the question of law arising upon those findings.

On the 17th of November the case was argued by

Buszard, *Q.C.*, and *Stanger*, for the plaintiff.

Lawrance, *Q.C.*, and *Graham*, for the defendant.

Cur. adv. vult.

The facts and arguments appear fully stated in the following judgment delivered on the 28th of November :—

SMITH, J.—This was an action tried before me and a common jury at Nottingham at the last Summer Assizes.

The plaintiff sued the defendant for damages, alleging that the defendant had, on the 22nd of March, 1882, put up for sale by auction certain property, and had described it in the particulars of sale as freehold property, with an annual net rental of 39*l.*; that this was a misstatement; that the plaintiff purchased upon the faith of such misstatement at the price of 650*l.*, whereby he was damnified.

The plaintiff based his claim, first, upon contract to be compensated should any error, misstatement or omission in the particulars of sale be discovered; and secondly, upon a false and fraudulent representation made by the defendant. The last ground of claim wholly failed at the trial, and was negatived by the jury, and need not now be further considered by me.

As to the cause of action founded on contract, the plaintiff established at the trial that the defendant had advertised the property in question as having a net annual rental of 39*l.*, and that such statement was also incorporated in the particulars of sale; that upon the faith of such advertisement and particulars he was induced to give 650*l.* for the property; that the property was only worth in fact 600*l.*, and that he was damnified to the extent of 50*l.*; that a particular of lot 6 was annexed to the contract of purchase and incorporated therewith, and that the lot was therein erroneously described. These facts were found by the jury, and must be taken to be the true facts of the case.

The plaintiff put in the contract of purchase dated the 22nd of March, 1882, and the conditions thereto attached, as also the particulars of lot 6 also attached thereto. The material parts of the contract are as follows :—"The undersigned, as agent for Frank Johnston, the vendor, hereby acknowledges that the undersigned, John Palmer, is the highest bidder for and purchaser of the property mentioned in the annexed particulars as lot 6, at the price of 650*l.*, subject to the foregoing special and common form conditions of sale, and that the purchaser has paid the sum of 65*l.* by way of deposit." The annexed particular of lot 6 was as follows :—

"Lot 6. Two freehold dwelling-houses (bay windows), being Numbers 22 and 24 Curzon Street, Nottingham, occupied by Messrs. Stanley & Co., annual net rental 39*l.*"

The condition of sale was as follows :—"The property is believed and shall be taken to be correctly described; but if any error, misstatement or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require; the amount of such compensation to be settled (regard being had to the purchase-money) by the auctioneer, whose decision shall be final." The auctioneer refused to adjudicate.

The defence set up at the trial was that the admitted mistake—namely, in describing the net rental as being 39*l.*—was fully explained to the plaintiff before he purchased; but this was negatived by the jury, and they found that he purchased the houses relying upon the fact and believing that the net rental was 39*l.* as represented in the particulars.

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On the 16th of August, 1882, a conveyance of the property was executed by the defendant to the plaintiff, and the plaintiff thereunder entered into possession thereof. It was a conveyance in fee of the property in question by the defendant to the plaintiff for the sum of 650*l.* There were no covenants whatsoever in the conveyance.

In January, 1883, the plaintiff discovered, as the fact was, that the rental described as being a net rental of 39*l.* per annum was a gross rental, the net rental being considerably below that sum.

Upon the jury finding the facts as aforesaid, the point was taken by the defendant's counsel that, inasmuch as the plaintiff had taken a conveyance of the property as above mentioned, the action was not maintainable, and that the case was covered by the decision of *Jolliffe* v. *Baker* (1).

At the trial it was understood that that case was under appeal, and such in reality was the case; and, by consent of parties, it was arranged that the decision of this case should stand over until the appeal had been heard.

It since, however, has been ascertained that, either from the insignificance of the amount at issue in that case, or for some other reason, the appeal had been abandoned. I am therefore now called upon to give judgment herein.

The point raised is as follows:—Is the plaintiff, who has a contract with the defendant that he (the defendant) will make compensation to the plaintiff should any error, misstatement or omission be discovered in the particulars (an error or misstatement as to the annual value of the property stated in the particulars having been discovered after conveyance), debarred from maintaining an action against the defendant upon the contract, because he (the plaintiff) has taken the conveyance of the property. I am of opinion that he is not.

The cases are as follows:—In *Cann* v. *Cann* (2), decided in the year 1830, the Vice-Chancellor (Shadwell) held that a vendee might maintain an action for damages for misrepresentation as to the value of property by the vendor although a conveyance had been executed; and, having so held, he determined that the vendee was entitled to be recouped his damages out of the purchase-money which was then in Court. This decision, so far as it goes, is in favour of the plaintiff.

The next case to which I need refer is that of *Boss* v. *Helsham* (3), decided in 1866. This is an express authority of the Court of Exchequer in favour of the plaintiff, and is wholly undistinguishable from the present case. There, as here, was a misstatement by the vendor as to the rental of the property sold. There, as here, a conveyance was executed, and afterwards the error was discovered and action brought. Baron Channel seems to me to put the case upon its right footing in his judgment, which as to this point is as follows:—"The contract stands, possession has been taken, the conveyance executed, the price paid, and the only question on the first breach is, whether there is or is not a right to sue for compensation for an error in the particulars of sale discovered after the completion of the conveyance. I am of opinion that there is such a right. It is contended that the execution of the conveyance concluded the parties; but we are dealing with an express contract between them from which the right to sue springs. Why should we limit it? Why should we say that because the purchaser did not discover the error until after completion he cannot sue for compensation? It seems to me that such a decision would be making a new contract between the parties different from that which they made themselves. Seeing, then, that the contract of sale can well stand, and yet that this claim which is founded on an independent contract can be enforced, I am of opinion that on the first breach the plaintiffs are entitled to our judgment." With every word of this I entirely agree.

In the year 1878 came the case of *Manson* v. *Thacker* (4). In this Vice-Chancellor Malins undoubtedly held that a vendee could not sue a vendor after conveyance for a misstatement contained in

(1) 52 Law J. Rep. Q.B. 609; Law Rep. 11 Q.B. D. 255.

(2) 3 Sim. 447.

(3) 36 Law J. Rep. Exch. 20; Law Rep. 2 Exch. 72.

(4) 47 Law J. Rep. Chanc. 312; Law Rep. 7 Ch. D. 620.

particulars of sale, although, as in the present case, the vendee had a contract with the vendor for compensation should errors or misstatements be discovered.

The Vice-Chancellor, as it seems to me, founds his judgment upon the fact that inasmuch as the vendee had ample opportunity to discover the misstatement before conveyance executed, therefore he was guilty of laches, and consequently he could not maintain a claim for compensation. With this reasoning I cannot agree. Why mere laches are to deprive a man of a right which he has by contract I do not understand. It seems to me that as long as the contract subsists, nothing short of a Statute of Limitations can prevent him obtaining the benefits conferred upon him by his contract. Moreover, in the present case, I cannot find that the plaintiff has been guilty of laches. He purchased the property believing in the representation made by the defendant that he the defendant was receiving a net rental of 39*l.* per annum for the property. Why was the plaintiff not to believe it? Where was the plaintiff to go for information better than to the man who was in receipt of the rents and profits of the property, and who would know exactly what were the outgoings which would reduce the gross rental received to the 39*l.* net which he represented? It seems to me to no one better than the defendant. I therefore hold that in this case the plaintiff has been guilty of no laches; and if the case of *Manson* v. *Thacker* (4) bound me, I should hold that the present case was distinguishable from that upon the above ground.

Later in the same year Vice-Chancellor Malins decided the case of *Besley* v. *Besley* (5). I may notice that in that case the plaintiff had no contract with the defendant to be paid compensation should an error or misstatement be discovered, nor does it appear to me that the plaintiff had any cause of action for damages by reason of a *tort* committed by the defendant; and I do not well see how he could support an action for damages against the defendant.

(5) Law Rep. 9 Ch. D. 103.

The Vice-Chancellor, however, bases his judgment, as he did in the case of *Manson* v. *Thacker* (4), upon the fact that the vendee had been guilty of laches, and therefore refused to give him relief. I may notice that the plaintiff did not ask to have his contract rescinded, but to be compensated in damages.

In 1879 the case of *In re Turner and Skelton* (6) was decided by the late Master of the Rolls. There, as here, there was a contract for compensation. The late Master of the Rolls, as in *Boss* v. *Helsham* (3), held that the fact of the conveyance having been executed did not disentitle the vendee to maintain his action for compensation under his contract with the vendor. In the same year Vice-Chancellor Malins decided the case of *Allen* v. *Richardson* (7), adhering to his former decisions. These authorities bring me down to the case of *Jolliffe* v. *Baker* (1), in the judgment of which I took part. The ground of my decision in that case was that the action being an action for damages the plaintiff could only succeed if he could establish a contract with the defendant and a breach of it by him, or an actionable *tort* committed by the defendant whereby the plaintiff had suffered damage. The *tort* being in my judgment negatived, and it not being suggested that the plaintiff had any contract with the defendant entitling him to compensation, I was of opinion, and still am, that the plaintiff could not maintain his action. My brother Cave concurred in the judgment on the ground that in his opinion there was no misrepresentation in fact established in the case. I am aware that my brother Williams held a strong opinion upon the point now raised, and has expressed it in his judgment.

That part of the case I never heard argued; nor was it, in the judgment of my brother Cave and of myself, necessary to decide the point in the case. Having, however, now had the advantage of the arguments in this case, I am unable to agree with that part of the judgment of

(6) 49 Law J. Rep. Chanc. 114; Law Rep. 13 Ch. D. 130.

(7) 49 Law J. Rep. Chanc. 137; Law Rep. 13 Ch. D. 524.

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my brother Williams which holds that after conveyance a vendee's right to sue upon his contract for compensation is gone, and I prefer the reasons given in the cases of *Boss* v. *Helsham* (3) and *In re Turner and Skelton* (6), and also by those cases had I considered otherwise I should have felt myself bound.

There was a point taken before me on the part of the defendant on the argument herein, that by the contract of the 22nd of March, 1882, and the conditions of sale which formed part thereof and the particulars of sale attached thereto, the plaintiff had no contract for compensation with the defendant. With this contention I am unable to agree, and I hold that the plaintiff had such a contract. It was also urged that if there was such a contract the same became merged in the conveyance of the 16th of April, 1882, and it was argued that the conveyance was the only existing contract between the plaintiff and the defendant, and that it was only to the conveyance and the rights thereby created that the Court could now look. For that proposition the judgments of Lord Justice James and Lord Justice Brett in the case of *Leggott* v. *Barrett* (8) were cited.

It seems to me that the judgments in that case are manifestly distinguishable from the point under consideration.

All that was there held was that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the completed contract is to be found in the deed, and that the Court has no right whatever to look at the preliminary contract.

In this case the preliminary contract as to compensation to be paid never was to be carried out by a deed. The deed, as it did, was only to convey the estate from the vendor to the vendee. And as a matter of fact it is, as before stated, a simple conveyance in fee without a single covenant being inserted therein.

It seems to me that the contract for compensation stands; that the plaintiff is entitled to sue upon it, although he has taken a conveyance; and, being of that opinion, I give judgment for the plaintiff for 50*l.*, with costs.

Judgment for plaintiff.

Solicitors—Swann & Co., agents for E. N. Elborne, Nottingham, for plaintiff; Lee, Ockerby & Everington, agents for . Bright, Nottingham, for defendant.

(8) Law Rep. 15 Ch. D. pp. 309 and 311.

[IN THE COURT OF APPEAL.]

1883. Dec. 21. { ASTE, SON AND KERCHEVAL *v.* STUMORE, WESTON AND COMPANY.*

Practice—Discovery by Interrogatories—Security for Costs—Power of Parties to dispense with Deposit by Consent—Order XXXI. rules 25 *and* 26.

A Judge is not bound to make an order dispensing with the deposit required by Order XXXI. rules 25 *and* 26, *where discovery is sought by interrogatories, merely because the parties have consented that such an order shall be made.*

Appeal from the Queen's Bench Division.

Field, J., at chambers, had refused to make an order dispensing with the deposit required by Order XXXI. rules 25 and 26, where discovery is sought by interrogatories, being of opinion that he had a discretion in the matter, notwithstanding that the parties had consented to such an order.

The Queen's Bench Division (Lord Coleridge, C.J.; Stephen, J., and Mathew, J.) affirmed the decision of Field, J., but upon the ground that the words of rule 26 were peremptory, and therefore that a Judge in no case had discretion to make the order.

The plaintiffs appealed.

L. E. Pyke, for the plaintiffs.—The Judge has a discretion under Order XXXI. rule 25 to dispense with the security. The Divisional Court were wrong in holding that rule 26 was separate and distinct

* *Coram* Brett, M.R., and Bowen, L.J.

from rule 25; those two rules must be read together; and the words of rule 25, "unless otherwise ordered by the Court or a Judge," give a discretionary power to the Judge at chambers to dispense with the security. Rule 25 deals with those cases in which security shall be given unless otherwise ordered; but rule 26 merely states the course of procedure to be adopted when security is to be given. In *Burr* v. *Hubbard* (1) the deposit required by the rules was dispensed with where the party applying was a poor man. Under rules 25 and 26 security for costs of interrogatories is to be given where one of the parties requires it from the other, but there is nothing in the rules to prevent a party waiving his right to the security if he chooses to do so.

[BRETT, M.R.—I think the object of the rules was to remedy what may be called the abuse of discovery since the passing of the Judicature Act.]

The first check is put upon this abuse by rule 1, which now requires leave to administer interrogatories to be obtained, whereas formerly no such leave was necessary. Rule 12 makes a similar provision with regard to discovery of documents. A further check is provided by rule 25, which deals with the mode in which the costs of interrogatories are to be dealt with; and rule 3 provides that, if the interrogatories have been exhibited unreasonably, vexatiously or at improper length, the costs occasioned by the interrogatories and answers thereto are to be paid in any event by the party in fault.

Gorell Barnes, for the defendants, was, by leave of the Court, heard in support of the appeal.—The object of rules 25 and 26 was solely to provide a security which could be enforced as a security for the whole costs of the action, but here each party is satisfied with the solvency of the other. It is now the duty of the Judge to decide whether the case is a proper one for the administration of interrogatories; and under rule 3 a power is given to deal with the costs occasioned by improperly exhibiting interrogatories. Moreover, by Order LXV. rule 11 a still more sweeping power over costs is given, for the solicitor may be ordered to personally pay costs in certain cases. Ample check upon any abuse is therefore provided. *Hall* v. *Liardet* (2) and *La Compagnie, &c., du Pacifique* v. *The Guano Company* (3) were also referred to.

BRETT, M.R.—In this case an application on behalf of wealthy clients was made to Mr. Justice Field for an order to administer interrogatories without the necessity of depositing the sum of 5*l*. Mr. Justice Field, assuming to act under Order XXXI. rules 25 and 26, enquired on what grounds the application was made, and being told that the other side consented to waive the deposit, considered that that was not a sufficient ground for exercising his discretion in the particular case, and declined to make the order. The Divisional Court on appeal took a stronger ground, being of opinion that the deposit could not be waived at all, and construed rule 26 to be absolute, and held that rule 25 did not give a Judge any power to use a discretion with regard to rule 26.

It was argued on behalf of the appellants that, by reason of the consent given by the other side, the discretion given by rule 25 to the Judge to otherwise order was absolutely taken away, and that, where the parties consent to waive the deposit, the Judge is bound to make the order.

It was suggested that the parties, if they could not obtain an order to administer interrogatories without paying money into Court, would be able to administer them without any order, if the other party did not object, and that the Court could not prevent them from so doing. It is here argued by both the parties that the Court has no discretion, but that the order must be made. Before the present rules were made, interrogatories were freely administered, and every possible kind of question was asked; the interrogatories were of extreme length, and under the Judicature Act, by reason of the power of interrogating which was thought to be given, there was an expenditure of money in the administra-

(1) Law Journal, Dec. 1, 1883, p. 650; W.N. 1883, p. 198.

(2) Law Journal, Nov. 17, 1883, p. 624; W.N. 1883, p. 176.

(3) Law Journal, Nov. 10, 1883, p. 609; W.N. 1883, p. 166.

tion of the most frivolous interrogatories, and in numbers of cases the answers were not even read at the trial; so that poor litigants were put to unreasonable and useless expense. It was, however, said that the rules were made solely for the benefit of litigants who might wish to avail themselves of them. But the rules were made not only for the protection of litigants who wished to be protected, but for the purpose of protecting feeble clients in spite of themselves. The object for which the rules were made is obvious upon the face of the rules themselves. It was said that the Divisional Court has decided that the rules are not in the least elastic, and that the protection intended to be given was by a deposit which must be made under rule 26, and that rule 25 does not give the Judge any discretion in any case to do away with the necessity of the deposit. It is not necessary to decide that point in the present case; but, as at present advised, I am unable to agree with that interpretation of the rules. I adhere to the interpretation put upon these rules by Mr. Justice Field in *Hall* v. *Liardet* (2). I have a strong opinion on the point, but I do not give it the virtue of a decision so as to make it a decision of the Court.

If rule 25 does allow a Judge to exercise a discretion so as to dispense with the deposit required by rule 26, we have to say whether Mr. Justice Field exercised a wrong discretion in deciding that he was not prevented, under the circumstances of the case, by the consent of the parties from refusing to dispense with the deposit. It was said that the Judge, in every case where the consent of the parties was proved, was obliged to make an order dispensing with the deposit; but I declare my opinion, with the utmost clearness, that the consent of the parties does not deprive the Judge of the right to decline to make the order. I do not say that the consent of the parties may not, in some cases, be some reason for dispensing with the deposit. These rules are, in my opinion, most salutary in a number of cases, and I should myself at chambers look narrowly at any application to dispense with the deposit where it was alleged to be by the consent of either side; and, except in certain exceptional cases, the allegation of consent would cause me to look more closely into the matter. The rules were made for the benefit of the ultimate client, whether he consents or not. I am of opinion that the view taken by Mr. Justice Field cannot be found fault with, and that the appeal must be dismissed.

BOWEN, L.J.—The question is important, not so much to the parties in this case, nor to the richer class of litigants in this country, as to the poorer class. Before the passing of the Judicature Act, the principles relating to discovery were widely and liberally applied to cases in the Court of Chancery; but in the Courts of common law, in addition to great commercial cases between rich parties and great proprietary causes which were daily tried at Westminster and in the country, there was a mass of smaller litigation which ran in very definite grooves, and in which not merely the forms, but the circumstances also, were alike.

On the common law side a more rigid system of administering interrogatories and of obtaining discovery was applied, and in that respect the common law was less elastic than that administered in the Courts of equity. The Judicature Acts, however, introduced at common law a more elastic and perfect means of obtaining discovery; but at the same time a most expensive weapon, which was found to be very oppressive to the ultimate client, who was often needlessly involved in expense, was placed within the control and reach of every litigant. The new rules were made with the object of checking, on grounds of public policy, unnecessary expenditure incurred in respect of such interlocutory proceedings.

A certain check has been put upon the administration of interrogatories: thus they are not, except in certain cases, to be administered without leave, and the costs occasioned by improperly exhibiting interrogatories are to be borne by the party in fault. Then rule 25 goes further, and provides that the costs of discovery, by interrogatories or otherwise, are to be secured in every cause or matter as provided by rule 26, unless otherwise ordered by the Court or a Judge. In the present

case the appellants applied to Mr. Justice Field to dispense with the provisions of rule 25, and, in other words, applied to the Judge to otherwise order; but the learned Judge did not consider himself bound to make such an order, simply upon the ground that the parties had consented to waive the deposit. The object of the rule is to protect all litigants, including the poorer class of litigants. The rule must not, therefore, be construed from the point of convenience to the richer classes. Mr. Justice Field having come to the conclusion that he would not in this particular case consider the mere fact of the parties having given their consent a sufficient reason for making the order, I think that the view so taken was a view he had a right to take, and that having a discretion in the matter, he exercised that discretion. The Court below confirmed the ruling upon the ground that the Judge had no discretion at all. It is not, however, necessary to decide that question. The question here is whether the Judge at chambers was bound to otherwise order, merely because both parties consented that he should. It seems to me that he would be placed in a very embarrassing position if he were forced to do so. The proposition now decided is that a Judge is not bound under Order XXXI. rule 25 to otherwise order, simply because the parties choose to consent that he shall do so.

Appeal dismissed, with costs.

Solicitors—W. A. Crump & Son, for plaintiffs; Irvine & Hodges, for defendants.

[IN THE COURT OF APPEAL.]

1883. Nov. 30. Dec. 21.

ROBINSON *v.* TREVOR AND OTHERS.*

Benefit Building Society—Mortgage—Statutory Receipt—6 *&* 7 *Will.* 4. *c.* 32. *s.* 5—*Third Mortgage—Tacking—Vendor and Purchaser Act*, 1874 (37 *&* 38 *Vict. c.* 78), *s.* 7—*Land Transfer Act*, 1875 (38 *&* 39 *Vict. c.* 87).

In 1865, *L., a member of a building society established under* 6 *&* 7 *Will.* 4. *c.* 32, *mortgaged certain premises to the society to secure all moneys to become due from him under its rules. In* 1868, *by a deed reciting the first mortgage, L. mortgaged his interest in the premises to the plaintiff. The first mortgagees received no notice of the second mortgage. In* 1875, *in pursuance of a previous arrangement with L., the appellants paid off the first mortgage, whereupon the trustees of the society handed to them the title-deeds, and also the first mortgage-deed indorsed with a receipt, pursuant to* 6 *&* 7 *Will.* 4. *c.* 32. *s.* 5, *and antedated to the date of the arrangement. The appellants, who had no notice of the second mortgage, also made a further advance to L., whereupon he assigned the premises to them to secure the whole sum so paid to him and to the first mortgagees. All three mortgages were duly registered in the North Riding registry in order of date. L. filed a petition for liquidation*:—Held, *that the appellants were entitled to priority over the plaintiff in respect of the sum paid to the first mortgagees, but not in respect of the further advance to L.*

Pease *v.* Jackson (37 Law J. Rep. Chanc. 725; Law Rep. 3 Chanc. 576) *followed.*

The Fourth City Mutual Benefit Building Society *v.* Williams (49 Law J. Rep. Chanc. 245; Law Rep. 14 Ch. D. 140) *considered per* BAGGALLAY, L.J.

Appeal of the defendants from a judgment of the Divisional Court (Mathew, J., and Cave, J.), dismissing an appeal from the County Court holden at Stokesley and Guisborough.

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

Robinson v. *Trevor, App.*

The facts and arguments appear in the judgment of Baggallay, L.J.

Meysey Thompson, for the appellants.
R. Luck, for the respondent.

The following cases were cited, in addition to those referred to in the judgments —*Rice* v. *Rice* (1), *Rooper* v. *Harrison* (2), *Lee* v. *Howlett* (3) and *Prosser* v. *Rice* (4).

The following judgments were delivered on December 21:—

BAGGALLAY, L.J.—This is an appeal from an order of a Divisional Court of the Queen's Bench Division affirming an order of the Judge of the County Court of Yorkshire holden at Stokesley and Guisborough; and the substantial question involved in it is, as to the effect of a receipt indorsed upon a paid-off mortgage given to a benefit building society established under the provisions of 6 & 7 Will. 4. c. 32, by one of its members.

The circumstances of the case are set forth in a written statement prepared and signed on behalf of all the parties to the action and filed in the County Court on the 4th of August, 1881; they may, however be concisely stated as follows:—

By a lease, dated the 16th of November, 1865, certain lands and buildings situate at Skelton in Cleveland, in the county of York, were demised to Thomas Lowe, for a term of ninety-nine years from the 13th of November, 1865. By a mortgage, dated the 29th of November, 1865, Lowe demised the said leasehold premises to the trustees of the Cleveland Benefit Building Society, which was a society established under the Act of 6 & 7 Will. 4. c. 32, and of which he was a member, for the residue of the term of ninety-nine years less the last three days thereof, to secure the payment by him of all moneys which might become due from him pursuant to the rules of the society.

By another mortgage, dated the 15th of September, 1868, Lowe demised the same premises to the plaintiff, for the residue of the said term less three days thereof, to secure to the plaintiff the payment of a sum of 70*l.* then due from Lowe to the plaintiff, and of such further sums as should thereafter be advanced by the plaintiff to or on behalf of Lowe. In the last-mentioned mortgage the lease and the mortgage of the 29th of November, 1865, were recited; and it is stated that the amount due from Lowe to the building society was 136*l.*, and no more. Notice of the mortgage to the plaintiff was not given by him, or on his behalf, to the building society. All the before-mentioned deeds were duly registered in the North Riding registry at Northallerton, shortly after their respective dates.

In the years 1869 and 1871, payments were made by the plaintiff to the building society on behalf of Lowe, and towards the discharge of what was due from him to the society under their security; but of these payments the defendants had no notice until after Lowe had presented his petition for liquidation, as will be presently mentioned.

Previously to June, 1875, Lowe applied to the three first-named defendants, who are the trustees of a lodge of Odd Fellows, and are the present appellants, to advance him the sum of 150*l.*, on the security of the premises comprised in the lease of the 16th of November, 1865. He informed them that the property was subject to the mortgage to the Cleveland society, but was not subject to any other incumbrance. The appellants agreed to make the advance; and it was further agreed between them and Lowe that they should, out of the 150*l.*, pay the amount due from him to the society on their mortgage. The appellants, accordingly, on the 10th of July, 1875, paid to the trustees of the Cleveland society the sum of 57*l.* 15*s.* 11*d.*, being the full amount then due from Lowe to the society; and thereupon the lease of the 16th of November, 1865, and the mortgage deed of the 29th of November, 1865, with a receipt signed by the trustees indorsed upon it, were handed over by the trustees to the appellants. The indorsed receipt was in the following terms:—"We, the undersigned, being the trustees for the time being of the within-mentioned Cleveland Benefit Building Society, do hereby acknowledge to have received from Thomas

(1) 2 Drew. 73; 23 Law J. Rep. Chanc. 289.
(2) 2 Kay & J. 86.
(3) Ibid. p. 531.
(4) 28 Beav. 68.

Lowe all moneys intended to be secured by the within deed. As witness our hands, this 11th day of June, 1875." It is the effect of this receipt that we have to consider upon the present appeal; but, before doing so, it will be convenient to advert to some further circumstances in the case.

It will be observed that the receipt is dated the 11th of June, 1875, although the sum of 57*l.* 15*s.* 5*d.* was not paid to the Cleveland society until the 10th of the following July; it is agreed that the receipt was so dated because the arrangement was come to on or before the 11th of June.

On the 20th of July, 1875, the appellants paid to Lowe the sum of 92*l.* 1*s.* 1*d.*, being the balance of the sum of 150*l.* agreed to be advanced; and thereupon, by an indenture bearing that date, and which was duly registered at Northallerton, Lowe assigned the said leasehold premises to the appellants for all the residue of the term of ninety-nine years, by way of mortgage, to secure the sum of 150*l.* and interest. On the 29th of July, 1875, Lowe, out of the sum of 92*l.* 1*s.* 1*d.* paid to him by the appellants, paid to the plaintiff the sum of 80*l.*, in part discharge of what was then owing by him to the plaintiff under the security of the 15th of September, 1868; but of this payment the appellants were not aware until after the commencement of the action.

In February, 1881, Lowe filed a petition for liquidation in the County Court of Durham, and, in due course, the usual liquidation resolutions were passed, and the defendant George Henry Pybus was appointed trustee.

In April, 1881, the action was commenced; it was in form an action for foreclosure, and its purpose was to have the priorities of the plaintiff's and appellants' securities determined. The action came on to be heard upon the before-mentioned statement of facts, the plaintiff claiming priority over the appellants for the full amount due to him under his mortgage of the 15th of September, 1868, and the appellants, on the other hand, claiming priority over the plaintiff for the full amount due to them under their mortgage of the 20th of July, 1875; and, on the 12th of August, 1881, the Judge, by his decree bearing that date, declared that the premises in question were subject to the following charges in the following order:—(1st) To a charge of what might be due to the appellants in respect of the 57*l.* 18*s.* 11*d.* paid by them to the Cleveland Building Society, and interest thereon from the 5th of July, 1875; (2nd), to a charge of what might be due to the plaintiff on the security of the indenture of the 15th of September, 1868, for principal and interest; and (3rd) to a charge of what might be due to the appellants on the security of the indenture of the 20th of July, 1875, so far as the same might not be included in their first charge. Accounts were ordered and directions given on the footing of this declaration. From this decree the present appellants appealed to the Divisional Court, which affirmed the decision of the County Court Judge, and from the judgment of the Divisional Court the present appeal has been brought.

The like contention was pressed upon the Divisional Court and has been pressed upon us as was urged upon the County Court Judge. In my opinion, and for the reasons I am about to state, that contention cannot prevail.

The receipt indorsed upon the mortgage of the 29th of November, 1865, was in the form required by section 5 of the Act of the 6 & 7 Will. 4. c. 32, and not in the form required by section 42 of the Act of 37 & 38 Vict. c. 42, as appears to have been assumed in the Divisional Court; but the receipt so given was, in my opinion, in the form proper to be adopted; for, although by the Act of 37 & 38 Vict. c. 42, the Act of Will. 4. had, at the date of the receipt, been repealed, and provision had been made by its 42nd section for an altered form of receipt, it was expressly provided that the repeal should not affect any subsisting society, duly certified under the repealed Act, until such society should have obtained a certificate of incorporation under the repealing Acts, for which provision was made, nor should it affect the force or validity of anything done or any security given under the rules of such society.

Now section 5 of the Act of Will. 4. enacts that the trustees of a benefit building society may indorse upon any mort-

gage given by a member of the society to the trustees a receipt for all moneys intended to be secured by such mortgage, and that such receipt should be sufficient to vacate the same and to vest the estate in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees to give any reconveyance of the property so mortgaged.

The question of the construction to be put upon this section came under the consideration of Lord Cairns in the case of *Pease* v. *Jackson* (5), the circumstances of which are so undistinguishable from those of the case which we are at present considering that it will be convenient to state them. On the 12th of May, 1856, Thomas Hood, a member of the Middlesborough Benefit Building Society, established under the Act of Will. 4, mortgaged certain freehold hereditaments to the trustees of the society to secure moneys due from him to the society; and on the 20th of August, 1857, being indebted to Pease and another, the plaintiffs in the suit, in the sum of 200*l.*, he gave them a bond for that amount and signed an agreement to execute a mortgage of the same lands, the agreement containing a reference to the previous mortgage to the society. On the 3rd of July, 1860, the defendants in the suit, at the request of Hood, paid to the trustees the sum of 223*l.* 1*s.* 6*d.*, being the amount then due to them under their mortgage of the 12th of May, 1856, and the trustees thereupon, and in accordance with the provisions of section 5 of the Act, signed a receipt indorsed on the mortgage-deed in discharge of all moneys intended to be secured by it, and handed over the deed and all the other title-deeds relating to the property to the defendants. On the same day Hood executed a mortgage dated the 4th of July, 1860, of the same property to the defendants to secure to them the sum of 230*l.* 4*s.* 5*d.*, the difference between that sum and the 223*l.* 1*s.* 6*d.* paid to the trustees being the amount of a debt then due to him from Hood. I may mention, though it does not appear upon the report in Law Rep. 3 Chanc., that the property was situate in Yorkshire and the several deeds were duly registered in the Riding registry.

The case of *Pease* v. *Jackson* (5) first came before Lord Romilly, the then Master of the Rolls, who decided in favour of the plaintiffs, allowing their claims for priority over the defendants in respect of the whole amount due to them under their equitable mortgage. On the hearing of the appeal the same contentions were urged on behalf of the then plaintiffs and defendants as were urged by the present plaintiff and defendants before the Judge of the County Court. Lord Cairns was of opinion that section 5 of the Act of Will. 4. must bear one of two constructions, and as the result of the then appeal would be the same whichever of the two constructions was applied, he did not deem it necessary to indicate to which of the two constructions he gave the preference. The one construction was that, if the mortgagor himself paid off the mortgage money, and a receipt was indorsed stating that he had done so, thereupon, without its being necessary for the trustees to give him a reconveyance, the property would vest in him, as being, in one sense certainly, the owner of the equity of redemption. The other construction was that, no matter by whom the mortgage money was paid, the receipt indorsed was to operate so that the legal estate in the mortgaged property was to go to whichever of all the persons entitled in any shape or form to the equity of redemption had the best equity to call for the legal estate. In the concluding portion of his judgment, to which, as materially affecting the question we have to decide, I shall have occasion to refer presently, Lord Cairns stated that he had decided the case on the principle of the better equity.

Now, though it is no more necessary for the decision of the present case than it was in *Pease* v. *Jackson* (5) to choose between the two constructions mentioned by Lord Cairns, I feel bound to express a preference for the latter as the more comprehensive, and this view was adopted by the late Master of the Rolls in a case to which reference will be made presently. Adopting then, as I am bound to do so, the views expressed by Lord Cairns, that

(5) 37 Law J. Rep. Chanc. 725; Law Rep. 3 Chanc. 576.

the true effect of a receipt indorsed on a mortgage in accordance with the provisions of section 5 of the Act of Will. 4. is to vest the legal estate in the property comprised in the mortgage in the person having the better equity to call for a conveyance, two questions remain for consideration: the first being, who in the circumstances of the present case had, at the time when the receipt dated the 11th of June, 1875, was signed, the better equity to call for a conveyance, as in such person the legal estate vested by operation of the statute? and the second, what amount of security or protection did the person in whom the legal estate was vested acquire?

There can, I think, be no doubt as to the answer to the first of these questions. The appellants, up to the time when they advanced their money to pay off the Cleveland society, had no notice whatever of the plaintiff's mortgage; on the other hand the plaintiff had by his mortgage distinct notice that it was not a first charge, but was subject to the previous charge to the Cleveland society; in addition to this, the appellants had obtained possession of the title-deeds to the property. The circumstances of *Pease* v. *Jackson* (5) were in every respect similar, and, following the decision of the Lord Chancellor in that case, I hold that the appellants had the better equity, and consequently the better right to call for the legal estate, and that the legal estate in the property comprised in the mortgage to the Cleveland society vested in the appellants by virtue of the indorsed receipt.

Again, having regard to the decision in *Pease* v. *Jackson* (5), the answer to the second question is equally clear. In that case, under circumstances which, as I have before shewn, can be in no respect distinguished from those of the present case, the Lord Chancellor held that the security acquired by the then defendants by reason of the legal estate becoming vested in them did not extend beyond the amount advanced by them to pay off the society, and that, as regards the further advance, they were incumbrancers puisne to the plaintiffs. In so deciding, the Lord Chancellor said that it was the circumstances attending the payment to the building society which gave the defendants the better title to call for the legal estate or to say it was in them, and that he could not agree with the argument on their behalf that, having accomplished that end, they were in as good a position as if they had got originally the legal estate by contract, and were entitled to tack to it the subsequent advance.

We were much pressed by the counsel for the appellants to adopt the views expressed by the late Master of the Rolls in the case of *The Fourth City Mutual Society* v. *Williams* (6), in which that learned Judge, under circumstances very similar to those which we are now considering, held that the person who acquired the legal estate by virtue of an indorsed receipt got the legal estate for all purposes, including the right to tack further advances made without notice of the earlier equitable mortgage. That case was decided in 1879 upon the construction of the 42nd section of 37 & 38 Vict. c. 42, which provided that when all moneys intended to be secured to a benefit society had been fully paid or discharged, the society might indorse upon or annex to such mortgage a reconveyance of the mortgage property to the then owner of the equity of redemption, or to such person and to such uses as he might direct, or a receipt, under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to the Act; and that such receipt should vacate the mortgage and vest the estate in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance whatever.

Under this Act, therefore, there were alternative modes of proceeding—the one by indorsing or annexing a reconveyance, and the other by indorsing or annexing a receipt—and the effect of each of these alternative modes was considered by Sir George Jessel. It is not necessary to enter into the details of his judgment. It, in effect, amounted to this: that there were alternative modes of getting the legal estate into the same person—namely, the owner of the equity of redemption—and that such owner was the person entitled

(6) 49 Law J. Rep. Chanc. 245; Law Rep. 14 Ch. D. 140.

to call for a conveyance. Now if, as regards the vesting of the legal estate, the true effect of the 42nd section of 37 & 38 Vict. c. 42 is the same as that of the 5th section of 6 & 7 Will. 4. c. 32, and if the circumstances of the case before Sir George Jessel are not to be distinguished from those of the case before Lord Cairns, the decision of the former is in direct conflict with that of the latter; and in such case, whatever might be my own views as to the true construction of the 5th section of the earlier Act, and as to its application to the circumstances of the present case, I should feel myself bound to follow the decision of Lord Cairns.

On the other hand, if any distinction can be drawn between the effect of the two sections, or if the circumstances of the two cases can be distinguished, the decisions may not be inconsistent, but in such case the decision of Sir George Jessel would not affect the decision of the present case.

That the former hypothesis is in accordance with the views entertained by Sir George Jessel appears, I think, from the following passage in his judgment: "Then there is a second point, which I understand was not argued at all on the part of the respondents in *Pease* v. *Jackson* (5), and was certainly assumed by me as counsel for the appellants—namely, that if the second mortgagee was entitled to the legal estate, he was entitled to it altogether;" and in a later portion of his judgment he observed that the point did not seem to him to have received sufficient consideration in *Pease* v. *Jackson* (5). I cannot adopt this view of the judgment of Lord Cairns; the point had been distinctly brought under his consideration by Sir George Jessel in opening the case of the appellants; whether the argument was replied to by counsel for the respondents does not appear from the report, but it was dealt with and disposed of in plain terms by Lord Cairns at the close of the judgment.

If, however, it had been open to us to adopt the views of the late Master of the Rolls as expressed in the case referred to, they could not, in my opinion, have been acted upon in the present case, and for this reason: In the County Court, and to some extent here, reference was made to the provisions of the 7th section of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), which was repealed by the 129th section of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87). The 7th section of the former Act is in the following terms: "After the commencement of this Act, no priority or protection shall be given or allotted to any estate, right or interest in land by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice." This is followed by a proviso protecting estates or interests existing before the commencement of the Act, which was the 7th of August, 1874. The 129th section of the Act of 1875 is as follows: "The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act." The commencement of the later Act was the 1st of January, 1876.

Now in the present case the legal estate, having been acquired by virtue of the indorsed receipt, was so acquired on the 10th of July, 1875, when the amount due to the building society was paid by the appellants. At that time the 7th section of the Act of 1874 had not been repealed, and if it was still in force the appellants would have been precluded by its provisions from holding or treating the property vested in them as a security for the further sum advanced by them to Lowe on the 20th of July, 1875. What, then, was the effect of the Act of 1875? If the repeal had been unqualified, inasmuch as it was to date from the time when the repealed Act came into operation—that is, from the 7th of August, 1874—some doubt might have been entertained as to the effect of section 7; but the repeal was qualified by the provision that it was not to have operation in respect of anything duly done before the 1st of January, 1876, when the repealing Act came into operation. Under these circumstances, I am of opinion that, apart from the decision in *Pease* v. *Jackson* (5), neither the indorsed

receipt nor the indenture of the 20th of July, 1875, conferred upon the appellants, as against the plaintiff, any security for further advances beyond the 57*l.* 18*s.* 11*d.* advanced to pay off the Cleveland society. Various other points were raised in the Court below which have not been urged, or, at any rate, have not been pressed, before us. I shall therefore merely refer to them, without discussing details. On the part of the plaintiff it was contended that he was entitled to priority by reason of the earlier registration of his security in the North Riding registry; and that, even if the earlier registration conferred no priority, it must be treated as notice to the defendants of the plaintiff's security, and that they could not be regarded as having a better equity than the plaintiff by reason of their having paid off the building society without notice of the plaintiff's security. The Judge of the County Court decided both these points against the plaintiff. On the other hand, it was contended on the part of the defendants that they were entitled to priority over the plaintiff on account of his not having given notice of his security to the building society, and also by reason of the defendants subsequently acquiring the legal estate in the whole term. Both these points were decided against the defendants.

In my opinion, the decisions of the learned Judge on all these points were in accordance with authority. Some cases were referred to which had been decided upon the construction of the Irish Registry Act, 6 Anne, c. 2; but it must be borne in mind that under that Act a mortgagee was prohibited from tacking so as to gain priority against a mesne registered incumbrance, and there is no such provision in the North Riding Act.

For the reasons I have thus stated I am of opinion that the Judge of the County Court and the Divisional Court arrived at a right conclusion as regards the priorities of the several incumbrancers, and that this appeal should be dismissed. I have dealt with this case at greater length than I should in ordinary circumstances have deemed necessary, as I consider the case to fall in all respects within the decision in *Pease* v. *Jackson* (5); but so many points of more or less nicety were discussed in the County Court before the very able Judge of that Court, that I have thought it right to consider them in the course of the present judgment, though those points had not been pressed upon us here.

I am unwilling to part with this case without making a suggestion which, if adopted, might render the decision of the late Master of the Rolls not inconsistent with that of Lord Cairns, and it is this: the alternative mode of vesting the legal estate, provided for by section 42 of the later Act, makes the indorsing of a receipt on the mortgage equivalent to a reconveyance, and thus gives it a greater effect than that attributable to a receipt indorsed under the provisions of section 5 of the earlier Act. I deem it unnecessary to do more than make the suggestion, as, if the argument involved in it is well founded, the decision of the late Master of the Rolls can be in no respect considered as an authority in the present case, in which the receipt was indorsed and acquired its effect under section 5 of the earlier Act.

BRETT, M.R.—I agree solely on the ground that the case is governed by the decision in *Pease* v. *Jackson* (1), which is binding on us.

BOWEN, L.J.—I rest my judgment on the same ground as the Master of the Rolls.

Appeal dismissed.

Solicitors—Iliffe, Russell, Iliffe & Cardale, agents for G. Robson, Middlesbrough, for plaintiff; R. M. & F. Lowe, agents for W. C. Trevor, Guisborough, for defendants.

[IN THE COURT OF APPEAL.]

1883. Dec. 7, 8, 10, 11. THE MAYOR, ETC., OF PORTSMOUTH *v.* SMITH AND OTHERS.*

Street—Expense of Paving—Liability of Adjoining Owners—Local Authority—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *ss.* 3 *and* 53.

The Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *enacts, in section* 53, *that "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged or otherwise made good," the local authority may pave, &c., such street at the expense of the adjoining owners; and "thereafter such street shall be repaired" out of the rates. The interpretation clause enacts that "the word 'street' shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act." In* 1857 *a special Act was passed, incorporating the above provisions amongst others of* 10 & 11 *Vict. c.* 34, *and in* 1864 *a provisional order applied it to P. In* 1875, *the plaintiffs, the corporation of P., widened, by agreement with the adjoining owners, a public highway within the limits of the special Act, and then made it good at their own expense, pursuant to the agreement; but they did not then pave or flag it. In* 1880, *the plaintiffs, acting as the local sanitary authority, paved and flagged the footpath at the side of this road, and then sought to recover the expense of so doing from the defendants, as the owners of adjoining lands:*— Held, *that the defendants were not liable, the road having been otherwise made good in* 1875, *so that the expense of paving done since that date could not be charged upon the adjoining owners.*

Held *also, by* BRETT, M.R., *and* BOWEN, L.J., *that the time to which the word "theretofore" referred was the date of the passing of the special Act; by* BAGGALLAY, L.J., *that it was the date when the work was done.*

Action by plaintiffs, as the urban sanitary authority for Portsmouth, to recover from the defendants, as owners of land abutting on a certain road, the expenses incurred by the plaintiffs in paving and flagging the footpath along that road.

It appeared that there was within the Portsmouth urban sanitary district a lane known as Milton Lane; that the defendants owned land abutting on this lane on both sides; and that this lane was, prior to 1857, not paved, metalled or regularly made into a road, although it was a public highway. In 1857 a local Act (20 & 21 Vict. c. xxxvii.) was passed, incorporating the main provisions of the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), and, in particular, section 53 (1) of that Act; and that local Act was

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) 10 & 11 Vict. c. 34. s. 3:—"The word 'street' shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act."

Section 53:—"If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good, the commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged, or otherwise made good, in such manner as they think fit; and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged or otherwise made good; and such expenses shall be recoverable from such occupiers respectively, as hereinafter provided with respect to private improvement expenses; and thereafter such street shall be repaired by the commissioners out of the rates levied under this or the special Act."

Section 54:—"If any street, not being a public highway at the passing of the special Act, be then or thereafter paved, flagged or otherwise made good, to the satisfaction of the commissioners, then, on the application of the greater part in value of the occupiers of the houses and lands in such street, the commissioners shall, by writing under their common seal, if they be incorporated, or if they be not incorporated then under the hands of five of the commissioners, declare the same to be a public highway; and thereupon the said street shall become a public highway, and shall be thereafter repaired by the commissioners out of the rates levied under this or the special Act. And such declaration shall be entered among the proceedings of the commissioners, and notice of such declaration shall be put up in some conspicuous place in or near such street."

Section 55:—"If any street, not being a pub-

in 1864 applied by a provisional order to this district. Nothing was done to this lane until 1875, when the corporation of Portsmouth, desiring to widen the road and to build a new lunatic asylum near to it, purchased by agreement from the defendants several acres of land for the purpose of widening the road. It was then agreed between the corporation and the defendants that the defendants should set back the hedges on either side of the road, and that "the expenses of widening and making up the said road shall be borne by the corporation."

In 1875 this road was widened and made up by the corporation, and a kerb was put along the edge of the footpath at the side; but that footpath was not then paved or flagged. The name of the road was then changed to Asylum Road. In 1880 the corporation, as the urban sanitary authority, paved and flagged that footpath, and they now sought to recover from the defendants, who owned land abutting on the road, the expenses of so paving and flagging that footpath.

The defendants declined to pay, alleging that the footway had been previously sufficiently paved or otherwise made good within the meaning of section 53 (1), and therefore that it was now repairable by the inhabitants at large; and, further, that the plaintiffs had agreed to do the work themselves, and that the road was not a street within 10 & 11 Vict. c. 34. s. 53 (1).

Lindley, L.J., asked the jury whether before 1879 the Asylum Road was, in the popular acceptation of the word, a street; and, secondly, whether the footpaths were then paved, flagged or otherwise made good. The jury found that it was not a street in the popular sense of the word, and that it was then otherwise made good.

Lindley, L.J., gave judgment for the plaintiffs.

The defendants appealed.

Charles, Q.C. (with him *E. Bullen* and *B. W. Smith*), for the appellants.—The definition given in the interpretation clause of the word "street" does not prevent that word from receiving its ordinary and popular meaning in other sections of the Act.

Robinson v. *The Local Board of Barton Eccles* (2), *Coverdale* v. *Charlton* (3), *The Queen* v. *St. Mary Islington* (4), *The Queen* v. *Platts* (5), *Maude* v. *The Baildon Local Board* (6), *Pound* v. *The Plumstead Board of Works* (7), *Nutter* v. *The Accrington Local Board* (8), and *The Queen* v. *Fullford* (9) were cited.

The plaintiffs made the road good within the meaning of section 53 (1) in 1875. By the agreement then made, the plaintiffs were to pay the expense of that work; and, the road having been once "otherwise made good," the expenses of subsequent repairs must, under the latter part of section 53 (1), be charged upon the rates. The fact that the corporation acts in two different capacities makes no difference—*Andrews* v. *The Mayor of Ryde* (10). When the first work was done, the adjacent owners could but for the agreement have been made to pay the expense incurred; but they cannot be called on to pay for the further expenses incurred in paving this footpath in 1880, because the road had already theretofore been "other-

lic highway at the passing of the special Act, be thereafter, to the extent of two-third parts thereof, paved and flagged or otherwise made good, to the satisfaction of the commissioners, then, on the application of the owners of the lands abutting on such parts of the said street as have been so made good, the commissioners may require the owners of the buildings or lands abutting on the remainder of the said streets to pave and flag or otherwise make good, to the satisfaction of the commissioners, such remainder of the said street . . . ."

20 & 21 Vict. c. xxxvii. s. 20, incorporated the chief provisions of 10 & 11 Vict. c. 34, and enacted that in construing that Act in connection with this Act, section 53 "shall be construed as if the word 'owners' were substituted therein for the word 'occupiers.'"

Subsequent legislation repealed the incorporation by the special Act of sections 54 and 55 of the general Act.

(2) 52 Law J. Rep. Chanc. 5; Law Rep. 8 App. Cas. 798.

(3) 48 Law J. Rep. Q.B. 128; Law Rep. 4 Q.B. D. 104.

(4) E. B. & E. 143.

(5) 49 Law J. Rep. Q.B. 848.

(6) Law Rep. 10 Q.B. D. 394.

(7) 41 Law J. Rep. M.C. 51; Law Rep. 7 Q.B. 183.

(8) 48 Law J. Rep. Q.B. 487; Law Rep. 4 Q.B. D. 375.

(9) 1 L. & C. 403; 33 Law J. Rep. M.C. 123.

(10) 43 Law J. Rep. Exch. 174; Law Rep. 9 Exch. 302.

wise made good," even though it had not been paved.

The words "although a public highway" in section 53 (1) may be omitted, as being mere description; the word "theretofore" refers to the time when the work was done, and not to the time when the special Act was passed—*The Queen* v. *The Great Western Railway Company* (11).

Bompas, Q.C. (with him *Pitt Lewis*), for the plaintiffs.—The definition clause in section 3 (1) governs the whole Act, and the word "street," whenever used, includes everything mentioned in that clause. This place, therefore, is a street within that clause. The word "theretofore," in section 53 (1), means before the passing of the special Act; the whole section fixes that as the period of time at which the section comes into operation. What the corporation did in 1875 they did as the corporation, and what they did in 1880 to the footpath they did as the urban sanitary authority: so that the work done upon the road and the work done upon the footpath was done by two different bodies, although the individuals in both may be the same. The agreement made by the corporation cannot affect the sanitary authority—that is, the present plaintiffs; and as the footpath had not been already paved, the plaintiffs were entitled to pave it and to charge the defendants with the expense of so paving it.

BRETT, M.R.—In this case an action was brought by the corporation of Portsmouth, as the urban sanitary authority for the borough, against the defendants, as the owners of property adjacent to a street upon which the plaintiffs did certain work, in order to cover the expenses of executing that work. Lord Justice Lindley left two questions to the jury; he asked them first, whether this place was a street, in the popular acceptation of the term, in 1879, before it was flagged and paved; and whether the footpath on the north side was sufficiently made good before the corporation dealt with it. The jury found that it was not a street in the popular sense of the word, and that it was otherwise made good. Adopting these findings, Lord Justice Lindley has given judgment for the plaintiffs. It seems to me that this road was within the district affected by the special Act; that it had been a mere country road; and that then by an agreement the place on which the road was to be made was straightened and laid out by the corporation. After that, between the years 1875 and 1879, the corporation put a road upon the place so straightened, but they did not pave or flag that road. There was, as it appears, a dispute as to what they did do; so that the question had to be left to the jury, regard being had to the provisions of 10 & 11 Vict. c. 34. s. 53 (1). In that section the general words "or otherwise made good" follow the particular words "paved and flagged"; they refer, therefore, to a process *ejusdem generis*, and they mean, as it seems to me, otherwise made into an artificial road in a manner similar to that in which a road is made by paving and flagging. On this question the jury found that the road was "otherwise made good"—that is, according to the construction which I put upon the section, that it was made into an artificial road in some manner similar to paving and flagging. This having been done, the corporation afterwards, in 1880, flagged the footpath at the side of the road; and for this second work they now seek to make the defendants liable, on the ground that the road has been paved, flagged or otherwise made good, and that the defendants are adjacent owners. It has been urged on behalf of the plaintiffs that the former work was done by them as the corporation and not as the sanitary authority. I understand that this point was raised at the trial, and that Lord Justice Lindley held that it was done by the corporation as the local sanitary authority. It appears to me that the agreement to which reference has been made only dealt with the road. Could the corporation do the work which they then executed save under the agreement; and, if they could not, must it not be assumed that they did it in the only way in which they could legally do it?

It is admitted on behalf of the plaintiffs that evidence was given from which inferences had to be drawn, and that no additional evidence could be given; so that

(11) 28 Law J. Rep. Q.B. 247.

we should, if necessary, have to draw the inferences ourselves, and give the judgment which we think ought to be given. There is therefore no necessity for a new trial on this point.

It has been urged that this place is not a street in the popular acceptation of that word, and that the jury so found. If the word "street," when popularly used, means, as I should think it does, a thoroughfare bounded either on one or both sides by houses, that finding would be right, for this place was not so bounded. Then arises the question whether this place was a street within the meaning of 10 & 11 Vict. c. 34. Now the word "street," as used in section 53 (1) of that Act, must be construed according to the definition given in the interpretation section. That section says: "The word 'street' shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act." Now this road is within the limits of the special Act, and it is a thoroughfare within the meaning of that Act. The words "shall extend to and include" mean that, in addition to the popular meaning given to the word "street," that word shall also mean something else, that it is to bear its usual popular sense, but also, and in addition, it is to have the meanings given to it by the interpretation clause. I find that in *Robinson* v. *The Local Board of Barton* (12), which, though not affirmed in the House of Lords, was not dissented from as far as this point is concerned, I said, "I think the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language, without the help of an Act of Parliament, would have called a street; and the other is a street which everybody, without the aid of an Act of Parliament, would have called a street."

I think that in those sentences I expressed the same view as that which I am now expressing, and I therefore repeat and adopt them.

We have been referred to the case of *Maude* v. *The Baildon Local Board* (6), and we find that the Divisional Court based their decision in that case on *The Queen* v. *Dayman* (13). I must say that I am unable to agree with the judgment in *Maude* v. *The Baildon Local Board* (6), and I think that the Court there was under a misapprehension as to what was decided in *The Queen* v *Dayman* (13).

I now come to that which seems to me to be a more difficult question, and that is, what is the meaning to be placed on the word "theretofore" in section 53 (1) of the Act of Parliament? On the one side it is said that it refers to the time when the special Act applies this clause to the locality, while on the other side it is said that it refers to the date at which the place in question was properly flagged—that is, to the time when the work in question was done by the plaintiffs.

The words "although a public highway at the passing of the special Act" are placed in the section, and I think that the ordinary idiomatic or grammatical way of dealing with the word "theretofore" is to hold that it refers to something which has happened before the passing of the special Act, and therefore that this word "theretofore" has reference to the time of the passing of the special Act. If this be so, then the second "theretofore," in the later part of the section, must have the same meaning and must refer to the same time. There is, as it seems to me, nothing to the contrary in the Act, and the context shews that this must be so. The enactment is dealing with the period of time when the roads are capable of being dealt with by the local authority, and the word "although" introduces the condition on which the roads are to go under the jurisdiction of the urban sanitary authority, the time being, as it seems to me, the time when the special Act was passed. If the construction of section 53 be doubtful, then it was urged that the two following sections assist us to construe it, because the use of the word "thereafter" in sections 54 and 55 shews that the time intended to be fixed is the time of the passing of the special Act. In opposition to this it was said that we are not entitled to consider those two sections, inasmuch as they were not incorporated

(12) 52 Law J. Rep. Chanc. 5, at p. 7; Law Rep. 21 Ch. D. 621.

(13) 26 Law J. Rep. M.C. 128.

into the local Act; but I am of opinion that when we have to construe section 53 it is legitimate for us to look at the adjoining sections of the Act in order to enable us to see with what meaning the Legislature used the words in the statute.

I therefore agree with the view taken by Lord Justice Lindley of the facts and with his interpretation of the word "street"; but, nevertheless, I am of opinion that the defendants are not liable in this action. This place was a street which the plaintiffs could pave, flag or otherwise make good, and, as a fact, they did otherwise make it good. That being done, it then became their right and, as regards the ratepayers, their duty to make the adjoining owners pay the expenses of executing the work. In this case they did not do so; but now that they have done the second and further work they contend that they can make an adjoining owner pay for paving or otherwise making good a street which no adjoining owner has paid for before, and that in such a case the persons who are adjoining owners at the time when the second work is executed are the persons who must pay the expenses incurred. That appears to me to lead to injustice, and would allow a local authority to make experiments at the expense of the adjoining owners, and I do not think that we are forced to come to that conclusion.

10 & 11 Vict. c. 34. s. 53 (1) gives the condition on the fulfilment of which the local authority have power to make the street into an artificial road; it is then their duty to charge the adjoining owners with the expenses; and should any of them not pay that charge, still those expenses cannot be charged on subsequent adjoining owners. If afterwards further works are executed upon the street, and those works are of such a nature as not to be, strictly speaking, repairs, but really the making of another kind of artificial street, yet such works must, for the purpose of this section, be taken to be repairs within the meaning of the last clause of section 53, which provides that such a street shall be repaired out of certain rates. I say for the purposes of this section, because we are only dealing with this Act, and not with any other Act of Parliament.

This point does not appear to have been pressed before Lord Justice Lindley, and therefore, although we allow this appeal and give judgment for the defendants, we are not differing from any formal judgment of his on this case.

BAGGALLAY, L.J.—I agree that this appeal must be allowed, and that the defendants are entitled to our judgment; but I do not base my judgment altogether on the same grounds as those on which the judgment of the Master of the Rolls proceeds.

The appellants contended that the road in question was not a street within the statute 10 & 11 Vict. c. 34; and, further, that even if it were such a street, still that they are not liable to pay the sum demanded of them in this action. With regard to the first question, I agree with the Master of the Rolls that this place was a street within the meaning of the statute, and I am of opinion that the words used in the interpretation clause are wider and go further than the words "shall mean." I see nothing in the subject-matter of this road which prevents the definition given in the interpretation clause from applying to it.

With regard to section 53 (1), I am unable to agree with the Master of the Rolls, for I think that the word "theretofore" refers to the time when the work was done, and not to the time when the special Act was passed. The special Act was passed in 1857, and adopted in 1864, and, as it seems to me, the word "theretofore" in section 53 (1) refers to the time when the work was done. The words "although a public highway" may be considered to be parenthetical, and if they are omitted the section would read, "If any street have not heretofore been well and sufficiently paved and flagged or otherwise made good, the commissioners may cause such street to be paved"; and this, as it seems to me, would avoid many difficulties to which the construction adopted by the Master of the Rolls gives rise, and with which he has so forcibly dealt.

I agree that we are entitled to look at sections 54 and 55 of the general Act in order to discover the true interpretation

of section 53 (1), and I think that they support the view which I adopt. Each of the three sections uses a different form of expression with regard to the relation of the general Act to the special Act, and those different forms of expression seem to me to have been used for a purpose. Section 53 (1) enacts, "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved"; in section 54 the enactment is, "If any street, not being a public highway at the passing of the special Act, be then or thereafter paved"; and in section 55, "If any street, not being a public highway at the passing of the special Act, be thereafter . . . . paved"—and these different expressions lead me to think that the word "theretofore" refers to the time when the plaintiffs dealt with this road—that is, to the time when the work was done, and not to the time when the special Act was passed. But, whether my opinion on this part of the case is well founded or not, I concur in the judgment of the Master of the Rolls upon the rest of the case, and agree that the defendants are not liable to pay the sum claimed in this action.

BOWEN, L.J.—I agree with the judgment of the Master of the Rolls, and with the reasons which he has given for it.

Appeal allowed; judgment for defendants.

Solicitors—Williamson, Hill & Co., agents for Hellard & Son, Portsmouth, for plaintiffs; Ford & Ford, agents for R. W. Ford & Son, Portsmouth, for defendants.

1883. Nov. 20.

DUCK *v.* BATES.

Copyright—Piracy—Dramatic Piece—Performance at Hospital for Benefit of Patients—Place of Dramatic Entertainment—3 & 4 Will. 4. c. 15. ss. 1 and 2, and 5 & 6 Vict. c. 45. s. 20.

The plaintiff was assignee of the copyright of a dramatic piece called "Our Boys," and the defendant was a member of an amateur dramatic club which had given three representations of that piece in the governors' room at Guy's Hospital for the entertainment of the nurses, patients and others connected with the hospital, to whom tickets were issued without payment. Tickets were also sent to the editors of five theatrical newspapers in order to obtain notices of the performance, but only one reporter came on one occasion. The expenses of these entertainments were defrayed by the governors of the hospital. In an action brought by the plaintiff to recover damages in respect of the above performances,—Held, *that there had been no performance of a dramatic piece at a place of dramatic entertainment so as to entitle the plaintiff to recover damages under 3 & 4 Will. 4. c. 15, in respect of an infringement of the copyright.*

This was an appeal from the decision of the Judge of the Southwark County Court.

It appeared that the action was for damages, or, in the alternative, for penalties of 40*s.* each, under the Copyright Acts 3 & 4 Will. 4. c. 15. ss. 1 and 2, and 5 & 6 Vict. c. 45. s. 20 (1).

(1) 3 & 4 Will. 4. c. 15 enacts, by section 1, that "the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, ... or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever . . . . any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof."

Section 2 enacts: "That if any person shall during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or

Duck v. *Bates.*

The plaintiff was assignee of a dramatic piece called "Our Boys," and the defendant was a member of an amateur dramatic club which, in January, 1883, gave three representations of that piece at Guy's Hospital for the entertainment of the nurses, attendants and others connected with the hospital. The admission was free, and the expenses of the seats and costumes were defrayed by the governors of the hospital. A general invitation was given to the nurses, attendants and others connected with the hospital through the sisters who superintended that institution, and tickets were also issued to the physicians, surgeons and senior students of the hospital, but on the last occasion a lesser number of such tickets was given, and in lieu thereof tickets were given to the members of the amateur club to distribute among their friends. On such occasion there were about 170 persons present. Tickets were sent to the editors of five theatrical newspapers in order to obtain notices of the performance, but only one reporter came on one occasion.

The learned Judge was of opinion, upon the authority of *Russell* v. *Smith* (2) and *Wall* v. *Taylor* (3), that the performances were performances of a dramatic piece at a place which was for the time being a place of dramatic entertainment within the above Acts, but was also of opinion, as a matter of law and fact, that the representations were not public representations, and that accordingly they did not infringe the plaintiff's right and expose the defendant to the penalties or damages sued for. The plaintiff was accordingly non-suited.

A rule *nisi* was afterwards obtained to set aside the nonsuit and to enter judgment for the plaintiff for 6*l.*, or for a new trial, against which

Lumley Smith, Q.C. (*W. G. Smythies* with him), for the defendant, shewed cause.—These were mere dramatic entertainments in private rooms. The Act 3 & 4 Will. 4. c. 15 clearly contemplates a representation for profit to which the public are admitted. Damages have never been held to be recoverable unless the performance has taken place in a public place and for profit, which are the tests laid down by Lord Denman, C.J., in delivering the written judgment of the Queen's Bench in *Russell* v. *Smith* (2). Here the performances were not public performances, and the whole of the expenses were borne by the governors of the hospital. The room where the performances took place did not become a place of public entertainment by reason merely of invitations being sent to the reporters and private friends. The law on this subject is correctly laid down in *Copinger on Copyright* (4), where it is said that "for

cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment . . . . any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor."

5 & 6 Vict. c. 45, enacts, by section 2: "That the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce or other scenic, musical or dramatic entertainment."

Section 20: "And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: and whereas it is expedient to extend to musical compositions the benefits of that Act and also of this Act: Be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in this Act provided for the duration of copyright in books."

Section 21: "That the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition, shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act."

(2) 12 Q.B. Rep. 217; 17 Law J. Rep. Q.B. 225.

(3) 52 Law J. Rep. Q.B. 558; Law Rep. 11 Q.B. D. 102.

(4) 2nd ed. at p. 325.

the performance to be an infringement of the rights of the proprietor, it is necessary that it should take place in public, a strictly private performance not being within the prohibition of the statute."

The plaintiff will doubtless rely on the following passage in the judgment of the Master of the Rolls in the recent case of *Wall* v. *Taylor* (3) as reported in the *Law Reports*: "Singing for one's own gratification without intending thereby to represent anything, or to amuse any one else, would not, I think, be either a representation or performance according to the ordinary meaning of those terms, nor would the fact of some other person being in the room make it so; *but where to give effect to the song it is necessary that the singing should be made to represent something, or else it is performed for the pleasure of other persons, then I think when this takes place it would be a representation or performance*" (5). In *Wall* v. *Taylor* (3) money was paid for admission, and the decision of the Court of Appeal in favour of the plaintiff was based on the ground that the performance was a public one. Even therefore if the Master of the Rolls is correctly reported, it is clear that his *dicta* were *obiter* and not necessary to the decision; otherwise a lady would be liable who sang a copyright song in her own house to her friends.

S. Leonard, in support of the rule.—The words of 3 & 4 Will. 4. c. 15. ss. 1 and 2 shew that any performance at a place of dramatic entertainment is an infringement of a proprietor's copyright, and the County Court Judge has found as a fact that the place where these performances took place was a place of dramatic entertainment. Moreover, the earlier provisions of the statute were enlarged by 5 & 6 Vict. c. 45, which gives the sole right of representation to the proprietor, the words of limitation in the earlier statute, "at any place of dramatic entertainment," being omitted. Besides, the passage cited from the judgment of Brett, M.R., in *Wall* v. *Taylor* (3) shews that the performances in question were dramatic entertainments; and that being so, the room in which such performances took place was a place of dramatic entertainment within the meaning of the earlier statute.

[LORD COLERIDGE, C.J.—With reference to the judgment of the Master of the Rolls, as reported in the *Law Reports*, I am expressly authorised by him to say that he never intended to lay down that the mere singing of a song in a drawing-room to one's friends would be an infringement of the copyright.]

Even if that be so, the performances in question were, to all intents and purposes, public ones; for free admissions were given to persons who were not inmates of the hospital, and a large number of persons availed themselves of the invitations which were sent, including a newspaper reporter. It is clear that the case comes within the mischief which the Legislature intended to remedy in the interests of proprietors of copyright; for if plays are well acted at performances such as these, persons who witnessed them would not be likely to go elsewhere to see the play, and so proprietors would be injured. "A performance," says Copinger, at p. 315, "nominally private, but in reality public, whether a charge be made for admission or not, would be restrained on the ground that it might be as injurious to the proprietor as if the representation had been public."

LORD COLERIDGE, C.J.—I do not at all say that this is not an important case, and I shall shew before I have done that I think it is an important case by the step that I propose to take in it. It is important, because Judges no more than other people can shut their eyes to what is going on in the world; and of course one is aware that there is a large number now of amateur theatrical performances going on by persons who do not act for money, or, if they do act for money, do so not for gain to themselves, but for gain to some charitable or public object which they have in view. I do not disguise at all from myself that it might be a great injury to the owner of the copyright of a dramatic piece that such piece should be clearly and well presented either in London or the provinces, or both, by companies of ladies and gentlemen, who, though they

(5) Law Rep. 11 Q.B. D. at p. 107. That portion of the above passage which is in italics does not appear in the Law Journal Report, see 52 Law J. Rep. Q.B. at p. 562.

take no money for themselves, may yet be taking money for charitable or other objects in which they are interested, and who give such satisfactory performances of popular works as to satisfy the cravings of many persons who attend those performances, and thereby prevent such persons from attending regular performances for money at places of public entertainment. I therefore do not complain of the appellant in this case having taken the opinion of the County Court Judge or of this Court upon the point of law which has been argued, because it may either be, or may become, an important question; though I own that I wish that some other occasion than a representation in the board-room at Guy's Hospital for the benefit of the nurses and the convalescent patients and other people connected with the hospital should have been chosen as the object of attack. To start with, I frankly admit that the bearing of the two statutes which have been referred to during the argument, the one upon the other, is not perfectly clear to my mind, and I therefore pronounce the judgment which I am about to pronounce with more hesitation than if it depended on the construction of the earlier statute only. If it depended on the construction of the earlier statute only, I must say I should have no difficulty in my own mind. It appears to me that, upon the true construction of the statute 3 & 4 Will. 4. c. 15, such a performance as has been given here is not within the mischief of that Act, and that if the matter stood upon the construction of that statute only, it would be clear that the respondent ought to succeed. I am not absolutely certain that I have mastered the provisions of the later statute; and if it be that the provisions and conditions of the later statute really do, as regards the subject-matter of the earlier statute, become more stringent, and render that the subject of penalty which was not the subject of penalty or the subject of action under the earlier statute, then the judgment I am about to pronounce would be, to that extent at any rate, doubtful, and possibly erroneous. But upon the best consideration I can give to the matter, it appears to me that the case before us turns wholly on the earlier statute, and for this reason: The later statute extended the literary copyright, and enacted a variety of provisions for the registration of works in which literary copyright was to be claimed and enjoyed; and by the 20th section, the statute went on to enact that its provisions in regard to literary copyright should be extended to those subjects which had been provided for by the statute 3 & 4 Will. 4. c. 15, which is in its terms, and as its recitals shew, expressly confined to what I may call dramatic copyright. I cannot see that the statute of Victoria is to be read into or incorporated with the statute of Will. 4., nor do I perceive that the judgment of the Judges of the Court of Appeal, to which it would have been my duty at once, and heartily, to defer, dealt at all with that question. They dealt with exactly the opposite question—namely, whether the penalty sections and the penalty enactments, so to call them, of the earlier statute were incorporated in the later, which a mere statement of it shews to be a very different question to the one that I was dealing with at this moment.

The Court of Appeal no doubt held that for certain purposes the earlier statute is to be read into the later, but it was not necessary for them in that case, and they do not appear to me to hold that the later statute is to be read into the earlier statute so as to alter or extend in any way the provisions of that earlier statute with regard to the subject-matter now before us. It does extend the term of dramatic copyright, and enacts certain provisions as to registration and otherwise, by following which a dramatic copyright can be secured. It does not, however, appear to me to alter the terms according to which infringements of the dramatic copyright, whether for the shorter or for the longer period, are to be determined.

I therefore come to the consideration of this question by endeavouring to ascertain, if I can, what in the present case is the true interpretation of the earlier statute, and what is the effect of the decision that has been come to upon the earlier Copyright Act in the case of *Russell* v. *Smith* (2). The case of *Russell* v. *Smith* (2), no doubt, is a case of high authority, because

it was a considered judgment pronounced by the whole Court of Queen's Bench, and goes with great care and elaboration into the provisions of the statute.

Now, the 1st section of 3 & 4 Will. 4. c. 15 provides that the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment shall have as his own property the sole liberty of representing, or causing to be represented, the same at any place of dramatic entertainment. Now, in order to ascertain what a "place of dramatic entertainment" means, it is important to consider the words of the 2nd section also. The right is conferred by the 1st section; the protecting penalty is enacted by the 2nd, which enacts that if any person shall, during the continuance of the copyright, contrary to the right of the author or his assignee, represent, or cause to be represented, without his consent, at any place of dramatic entertainment, any such production, or any part thereof, every such offender shall be liable to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damage.

Now the damages which are affixed to "such representation"—that is to say, a representation at a place of dramatic entertainment—are to be either a liquidated sum, or the benefit and advantage which the person has derived from it, or the injury or loss which he has inflicted on the person whose right he has contravened. It seems to me that these alternatives are put as an equivalent of the forty shillings, and shews that such a representation as is dealt with in the case of *Russell* v. *Smith* (2) (to which I will in a moment advert) is the only sort of representation which is intended to be protected, and for which an action will lie under that earlier section, or, in other words, that the right given in the 1st section is not infringed by any representation which does not come within the terms of the protective penalty, or damage enacted by the 2nd section. If there be any representation which does not clearly give any benefit or advantage to the person representing, or inflict any injury or loss upon the person whose right is supposed to be contravened, unless there are some other words in the statute or there be some other ground on which it is to be recovered, then such a representation is not intended to be within the protection of the earlier statute. Now upon that earlier statute the case of *Russell* v. *Smith* (2) was decided, and that case is only important with reference to the recent case of *Wall* v. *Taylor* (3), because it happened to be a song; but it was not because it was a song it was protected, but because it came within the words "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment."

In *Russell* v. *Smith* (2) the one question was, whether a song which had been represented, for the profit of the person representing it, at a large public hall open to all mankind who could afford to pay for admission and who could find accommodation within the hall, had been represented at a place of dramatic entertainment: and the Court more than once put as ingredients in testing whether the place was one of dramatic entertainment—first, whether the thing represented was dramatic; next, whether the representation was a public one; and lastly, whether the representation was for profit. It may be said that those matters were not essential to the decision of the case. I do not think it could be truly said, because in a written judgment of the Court, consisting of four Judges, it is not very likely that a definition which contained matters wholly unnecessary for the thing defined would have been inserted; and it is not once, but twice over in the course of the judgment that a place of dramatic entertainment is made to depend, not only on the representation therein of a dramatic piece, but on the representation of a dramatic piece in public and for profit.

Now I am not aware that that case has ever been overruled. I am not aware that that case has ever been in terms questioned; but I am aware that the *obiter dictum* (unnecessary for the decision of the case) of the present Master of the Rolls goes very much beyond the definition

of "a place of dramatic entertainment" as laid down by the Court of Queen's Bench in the case of *Russell* v. *Smith* (2). The Master of the Rolls, if he is to be taken literally, does apparently, in construing the later statute, though he seems to have been of opinion that the song must have been sung at some place of dramatic entertainment, say that a place becomes a place of dramatic entertainment if a song is sung therein, as I understand him, with more than one person in the room, and if it is sung for the delectation of a number of friends collected in a drawing-room for the very purpose of hearing a good singer sing a song. I mentioned during the course of the argument that the Master of the Rolls had stated to me that those expressions of his to which I have referred went far beyond what he is now prepared to adhere to; still there are his observations, and they have been reported.

There can be no doubt that if the later statute is to be read into the earlier (which I have given reasons for thinking is not the case), and if the words of the Master of the Rolls are to be taken in their full sense, the appellant ought to succeed, inasmuch as this undoubtedly was a dramatic piece given in a room for the delectation of a great number of people collected there. I have, however, given reasons for thinking that the case of *Russell* v. *Smith* (2) lays down the true test in a case like the present; and, if I am right, the appellant is not entitled to succeed. I decline to say what might or might not under other states of circumstances be my opinion—as, for instance, a case in which it was complained that at some place of dramatic entertainment, either a regularly licensed theatre, or a place obviously of public entertainment or for profit—whether personal profit or general profit—there had been a dramatic performance of a copyright work without the licence of the author or assignee in whom the copyright exists. If such a case came before me, I by no means desire to be precluded by the judgment I am now pronouncing. I only say upon the facts of this case, as far as I can gather from the evidence and from the judgment of the learned County Court Judge, it does not appear to me that "Our Boys" was performed at a place of dramatic entertainment. It does not appear to me that the representation, therefore, was a representation within either the 1st or 2nd section of the 3rd and 4th Will. 4., and I think therefore that the defendant is entitled to succeed.

I will only make this further observation, that the learned County Court Judge has not found (as it was too hastily assumed that he had) as a fact that this was a place of dramatic entertainment. He has held that it was a place of dramatic entertainment (as he was bound to do if he thought it was so decided), in supposed obedience to the cases which were cited before him. With deference, I think he was wrong in having so held, but I think he did so feeling himself bound by cases which, upon examination, turn out not to have been binding. As, however, I am quite aware this may be a question which may become an important one, I am quite prepared, if it is thought worth while, to give leave in this case to appeal to the Court of Appeal, where my judgment may be carefully considered, and set right if it is wrong.

STEPHEN, J.—I am of the same opinion, and I have very little indeed to add to what has been stated by my Lord. It seems to me that this case is an important one, and, as it has been discussed at some length, I will shortly give my own opinion upon it. The Act 3 & 4 Will. 4. c. 15 provides for the first time that the author of any play shall have as his own property the sole liberty of representing it at any place or places of dramatic entertainment whatsoever. The 2nd section provides that "if any person shall during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount of not less than forty shillings, or to the full amount of the benefit or advantage arising from such representa-

tion, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages."

Now, the question is, whether that penalty has been incurred on the present occasion. I do not wish again to go over the case of *Russell* v. *Smith* (2), because that has already been gone through by my Lord, and I shall only repeat what he has said. It appears to me that the Act, as interpreted by *Russell* v. *Smith* (2), lays down that there is not to be any public representation, at any place of dramatic entertainment, of any play. I would rather not bind myself to the statement that profit of some kind is absolutely, and under all circumstances, necessary; for here, as it seems to me, all the necessary elements of publicity were wanting. There was no profit, no general public admission—the place was the board-room of the hospital, which is not, in the ordinary sense of the word, a place of public or dramatic entertainment. But I wish to be cautious in putting an interpretation on this Act, and I wish to be cautious in what I say on the subject of the tests as to what is an infringement within this Act. I can imagine conceivable and possible cases which I should be very sorry indeed to say were not within the Act, although I do not say they are. I mentioned in the course of the argument one of them which certainly would be an extreme case. Suppose, whilst a copyright play is being acted at one theatre, the manager of another theatre were to perform the same play for the purpose of damaging the author, and were to throw his theatre open gratuitously to any person who came to see it. I do not say whether that would come within the Act or not—I am very far indeed from saying it would not come within the Act. I agree so far with Mr. Leonard's argument. I think the injury which would be done to the person who has the sole liberty of representation at a place of dramatic entertainment is a very important matter for consideration, perhaps the leading matter. That being my opinion with regard to the Act 3 & 4 Will. 4., on which the question turns, what is to be said as to the Act of 5 & 6 Vict. c. 45, as to its effect on the first Act? The 5 & 6 Vict. c. 45, which is well known as Serjeant Talfourd's Act, is the principal Act relating to copyright. That Act introduced very great changes into the law of copyright as it then existed, and it introduced the whole machinery of registration, and so on, which has nothing to do with the present case.

The 20th section of that Act extended the time of the copyright of a dramatic piece to forty-two years, but it does not appear to me in any degree to have altered the nature of the right conferred by the Act of Will. 4. The words are: "And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property; and it is expedient to extend the terms of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright."

It seems to me that the liberty which is given by the first Act is the liberty of representing at places of dramatic entertainment as interpreted by the case of *Russell* v. *Smith* (2). I cannot myself see that the Act of Victoria had any other effect which I need notice here, or any other effect material to the present question, on the rights that were conferred by the Act of Will. 4. The present case therefore substantially stands upon the question of the interpretation of the Act of Will. 4. Then comes the case which was decided in the Court of Appeal and the judgment of the Master of the Rolls. I think when that case is properly looked at it will be found that it applies entirely to musical compositions. The effect of it is this: the Master of the Rolls says it must be remembered that the copyright of musical compositions was given for the first time by the Act of 5 & 6 Vict. c. 45. Now, that Act says, with regard to musical compositions, that the liberty granted by the first Act is to be extended to musical compositions. This is the enactment:—"Be it enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic pieces or musical compositions, shall endure and be the property of the author thereof

Duck v. *Bates.*

and his assigns for the term in this Act provided." Now, the interpretation put upon that provision by the then Lord Justice Brett, now the Master of the Rolls, is that the words relating to the place of dramatic entertainment do not apply to musical compositions. That is his view, and if that amounts to an express decision upon the point, by that authority we should be bound. But that matter does not apply, so far as I can see, to this case at all. No doubt Lord Justice Brett goes on to use some language with reference to musical compositions which would have the extraordinary consequence which has been already adverted to—namely, that everybody who sung a copyright song in his own drawing-room for the entertainment of his guests would thereby be guilty of an infringement of the copyright of the author of the song, and would be liable to the penalty provided for by the Act. I must say, so far as the mischief to authors goes, I should think it would be very difficult to imagine anything more mischievous to authors than that a copyright song should not be allowed to be sung in a drawing-room, because the effect of that would be that it never would become known at all. Therefore, I should be very sorry to arrive at such a conclusion. What my Lord has stated as to the views of the Master of the Rolls shews that the Master of the Rolls either did not intend to go so far as that, or that he had not sufficiently construed the provisions of the Act in making use of the language which has been referred to. At all events, it seems to me that this Act 5 & 6 Vict. c. 45. s. 20, and the case decided on it, do not really deal with this case, and that this case ought to be decided on the earlier Act, to which I have already referred.

I think there is no occasion for me to say anything with regard to the judgment delivered by the County Court Judge. He seems to have taken a view of the question somewhat more against his own opinion than I think was necessary; but that is all. Upon the whole, I agree with the judgment which has been pronounced by my Lord; and I also think that, as some difficulty certainly was introduced in the matter by the language of the Master of the Rolls and by the decision of the Court of Appeal, it would be proper that there should be leave to appeal if the parties are desirous of doing so.

Rule discharged.

Solicitors—B. C. Cowan, agent for J. A. Tucker, Bath, for plaintiff; Burgess & Cozens, for defendant.

1883.
Nov. 26.
Dec. 1.

LENDERS *v.* ANDERSON.

Practice—Service of Writ out of Jurisdiction—Order XI. rules 1 (*e*) *and* 2—*Defendant domiciled in Scotland or Ireland—Action for Breach of Contract.*

Order XI. rule 1 (*e*) *has taken away the power of the Court to allow service of a writ out of the jurisdiction in actions for breach of contract within that rule, where the defendant is domiciled or ordinarily resident in Scotland or Ireland.*

This was an application to set aside the service of the writ of summons which had been made out of the jurisdiction, referred by Field, J., to the Court.

The plaintiffs, corn merchants in London, sued the defendant, a merchant in Glasgow, for an alleged breach within the jurisdiction of a contract which was by its terms to be performed within the jurisdiction.

The defendant was domiciled in Scotland, and on the *ex parte* application of the plaintiff, Field, J., had granted leave for the service of the writ out of the jurisdiction, and it had been served on him in Scotland.

Finlay, Q.C. (*Nicoll* with him), moved, under Order XII. rule 30, to set aside the service.—As the affidavit shews that the defendant is domiciled in Scotland, he comes within the express words of the exception in sub-section (*e*) of rule 1 of Order XI., and service cannot be made upon him. Under the Common Law Pro-

cedure Act, 1852, there was no power to serve a defendant in Scotland or Ireland, and this continued to be the law until the Judicature Act, 1875. The new rules are intended to bring back the previous state of things and remove what has been felt to be a hardship by Scotchmen and Irishmen and complained of as such. There is no power to allow service out of the jurisdiction in actions of *tort* at all, and not in contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. The words are very plain in rule 1 (*e*), and rule 2 only applies to cases falling within rule 1.

Gorell Barnes, contra.—The discretion of the Court is not taken away. The words in rule 1 (*e*) were not intended to exclude the operation of rule 2. It is to that very sub-section (*e*) that rule 2 applies; it cannot apply to the other sub-sections; and it would have no effect at all unless the meaning be, as it is contended it is on reading the two rules together, that in the case of defendants domiciled in Scotland or Ireland, the Court must exercise their discretion as to allowing service out of the jurisdiction, subject to the considerations set out in rule 2.

The true construction is that the Court may allow service out of the jurisdiction, but it shall not be allowed as of course where the defendant is domiciled in Scotland or Ireland.

[GROVE, J.—Then you contend that rule 2 was passed only to apply to the few words at the end of sub-section (*e*).]

Yes, because the words "concurrent remedy" in rule 2 are meaningless except as applicable to cases of breach of contract under sub-section (*e*). The Small Debts Court in Scotland can deal only with, and have no jurisdiction except for, small debts. If the defendant's contention be right, a man incurring small debts in London could not be sued here if he had a domicile in Scotland, though he might be frequently living in London. Before the Common Law Procedure Act, 1852, a Bill in Chancery could reach everywhere. It was never intended to make so complete a change from the practice under the Judicature Act by the mere insertion of these few words limiting one sub-section of this rule, and it is certainly convenient that a defendant who contracts here to do something and breaks that contract here should be liable to be sued here.

Finlay, Q.C., in reply.—The argument on the other side is based on what the framers of the rule must have intended. There was, however, clearly an intention to alter the practice—*torts* were left out altogether: and it is reasonable that there should be a return to the practice as it was before 1875. Rule 2 refers to the jurisdiction of the Court of Session, the superior Court of Scotland, which extends to everything; and by 40 & 41 Vict. c. 50 jurisdiction is given to the Sheriff's Court in all actions relating to land of 50*l.* annual or 1,000*l.* principal value. Thus it is apparent that almost every one of the sub-sections in rule 1 falls within the jurisdiction of the Sheriff's Court.

Cur. adv. vult.

GROVE, J. (on December 1).—This case, argued before us a few days ago, was referred to the Court by Mr. Justice Field, to whom an application had been in the first instance made to give leave for service of a writ of summons out of the jurisdiction, when he gave formal leave for such service; and the question is whether such service should be set aside.

It raises an important question under Order XI. rules 1 and 2. The action was one of contract, and the plaintiffs are corn merchants in London, the defendant being a person domiciled in Scotland; and as nothing turns on the particular terms of the contract between the parties, it is enough to say that there was an alleged breach within the jurisdiction; and the sole question is whether, as the defendant resided in Scotland, the Court could give leave to serve the writ on him out of the jurisdiction. The words of Order XI. rule 1 (*e*) are, that "service out of the jurisdiction of a writ of summons may be allowed by the Court or a Judge whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to the true terms thereof ought to be performed within the jurisdiction unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." This is the only one of the sub-sections of rule 1

which refers to breach of contract specifically; and the words read by themselves appear to be perfectly clear. Unless, therefore, there is something to shew that we must read them in a different sense to the obvious one, service could not in the present case be properly allowed.

The argument against the adoption of the obvious meaning of the words as excepting defendants domiciled or ordinarily resident in Scotland or Ireland, was based chiefly on a consideration of rule 2 of the order. It was argued that rule 2 must apply to cases under rule 1, sub-section (*e*), because if not, there was no part of "the last preceding rule" to which rule 2 could apply. Now on reading rule 2 I find general words in it which seem meant to apply to the whole of the last preceding rule, and it would be a strange construction to say that sub-section (*e*) only is referred to by the words "last preceding rule," which words I think expressly include all the sub-clauses of rule 1.

But I do not agree that rule 2 is in fact applicable only to cases falling within the words of sub-section (*e*). I think it is applicable to other of the sub-clauses; and therefore the argument fails, even if it is not applicable to all the cases in rule 1.

Then the next argument urged is that the exception would apply to a larger number of cases than the rule itself, as to which I can only say that it might have some weight were we legislators, and not Judges interpreting a statute. Next it was said: Is it likely that the Legislature would have made so very wide an exception as this is?—to which the answer is, that for many years it did so. The Common Law Procedure Act, 1852, had this very exception, and it was therefore in operation from 1852 to 1875.

If we are to look for reasons for the present enactment, I think we may regard it as probable that the framers of the rule may have considered that there being excellent Courts in Scotland and Ireland, superior Courts fully competent to deal with such actions, they would not bring defendants to England or force them into an English Court, the general rule being that a defendant should be sued in his own forum. They therefore, giving effect to the maxim "*actor sequitur forum rei*," brought the practice back to what it was under the Common Law Procedure Act.

It was suggested in the course of the argument by my brother Huddleston that the meaning of rule 1 is that service out of the jurisdiction shall be allowed generally as a matter of course, and that rule 2 means that "where leave is asked" to serve a writ in Scotland or Ireland the Court should look at it as a special matter, and exercise a discretion, having regard to the considerations pointed out in rule 2. I cannot agree with this suggestion. A discretion is given by the opening words of rule 1. It has always been the case that leave has to be applied for to serve a writ out of the jurisdiction, and all the rules of Order XI. contemplate leave being asked for and granted in the discretion of the Court. Leave is therefore a condition precedent to service, and I see nothing to take away the discretion from the granting of leave under rule 1.

That being so, when we come to sub-clause (*e*) the words are perfectly plain which except defendants domiciled or ordinarily resident in Scotland or Ireland from being subject to the general power. There is nothing, as I have shewn, in the context, and nothing in the history or reason of the matter, to negative their natural construction, and it is our duty to give effect to them in interpreting the order. The effect is that they mean what they say, and that there was therefore no power here to give leave for service out of the jurisdiction, and the service must be set aside.

HUDDLESTON, B.—I am of the same opinion. This question is one of importance as affecting a very large number of cases in which, according to the old rules, application might have been made for leave to serve a writ out of the jurisdiction. We are asked by the defendant to say that by the new rules there is no longer any power to give such leave in these cases. I own that at first I thought the argument for the plaintiff might be well founded, and that although the concluding words in Order XI. rule 1 (*e*) are strong, it was very doubtful whether it could have been intended to make so ex-

tensive a change in the practice by those words, and whether, if such had been the intention, it would not rather have been expressed clearly in a separate rule by itself. I also thought an argument arose in favour of the plaintiff by reason of the wording of rule 2. But on reflection I have come to the conclusion that the contention of the defendant is correct.

This is an application under Order XII. rule 30, to set aside the service of the writ upon the defendant. The question, therefore, for us is, whether there was power in this case to give leave for the service of the writ out of the jurisdiction.

The power to grant such leave is given by Order XI., and rules 1 and 2 of that order are those upon which this question chiefly turns. Rule 1 enacts that service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed in seven classes of cases enumerated in the sub-clauses of the rule. It is to be observed that the power which previously existed of allowing service out of the jurisdiction in actions of *tort* is taken away except so far as such a power is involved in sub-clauses (*a*), (*c*) or (*f*), and therefore a very considerable change was undoubtedly contemplated by the new rules. Clause (*e*) is the clause upon which this case turns. That clause provides for service out of the jurisdiction in actions for breach within the jurisdiction of a contract to be performed within the jurisdiction "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." These words appear to be an explicit exception of actions for breach of contract against defendants domiciled or ordinarily resident in Scotland or Ireland; but it is to be observed that they do not prevent service in such actions on persons in Scotland or Ireland who are not domiciled or ordinarily resident in those countries. Then by rule 2 it is provided that "where leave is asked from a Court or Judge to serve a writ under the last preceding rule in Scotland or Ireland, if it shall appear to the Court or Judge that there may be a concurrent remedy in Scotland or Ireland, as the case may be, the Court or Judge shall have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant or person sought to be served, and, particularly in cases of small demands, to the powers and jurisdiction under the statutes establishing or regulating them of the Sheriff's Courts or Small Debts Courts in Scotland and of the Civil Bill Courts in Ireland respectively." It is easy to understand the objects of the framers of this rule, for it is obvious that where there is a concurrent remedy, before allowing the writ to be served in Scotland or Ireland, it is reasonable to consider the balance of convenience, and, when the demand is a small one, what local Courts may exist for the purpose of dealing with such demands. The argument for the plaintiff is that this rule could have no application if it were held that the effect of rule 1 (*e*) was absolutely to exclude from the provisions of the order all actions for breach of contract brought against defendants domiciled or ordinarily resident in Scotland or Ireland. I cannot agree with that contention. It appears to me that even if rule 2 would not apply to all, at any rate it would apply to many of the cases mentioned in the other clauses of rule 1. It might apply, for instance, to cases coming within clause (*c*), that is, in cases where relief is sought against a person domiciled or ordinarily resident within the jurisdiction, but who is temporarily resident out of the jurisdiction. There is nothing in clause (*e*) itself to except the case of a person who is casually and temporarily resident in Scotland or Ireland, but not domiciled or ordinarily resident there. So also rule 2 might apply to cases under clause (*f*) where an injunction is sought.

The counsel for the defendant pointed out to us that the Sheriff's Court in Scotland has a very considerable jurisdiction, up to 50*l.*, in actions involving pecuniary demands, and in actions relating to land of the value of 1,000*l.*, or the yearly value of 50*l.* For these reasons, it appears to me that we ought to give the words of clause (*e*) their natural meaning.

It is satisfactory to know that this conclusion is in accordance with the whole history of service of writs out of the jurisdiction. Down to the time of the Common Law Procedure Act, 1852, there was no provision for service of a writ out of the jurisdiction. That defect was remedied by

Lenders v. *Anderson.*

the 18th section of the Common Law Procedure Act, 1852; but that section, like Order XI. rule 1 (*e*), expressly excepts Scotland and Ireland from the operation of its provisions. I observe that it is stated by my brother Day, in a note to the section in his work on the Common Law Procedure Acts, that this exception was introduced into the Act at the last moment, and I have no doubt that some Scotch or Irish members of Parliament, jealous of any interference with matters affecting Scotland or Ireland, caused its introduction. That state of things continued down to the passing of the Judicature Act, 1875. By that Act, Order XI. rule 1, power was given to serve a writ out of the jurisdiction in the cases mentioned in the order, even upon a domiciled Scotchman or Irishman. This provision passed unnoticed; but it is notorious that after it had passed there was an outcry by the Scotch and Irish members, and Order XI. rule 1 (*a*) was framed for the protection of Scotchmen and Irishmen. That rule directed that the Judge, in exercising his discretion as to granting leave to serve the writ out of the jurisdiction, should have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England, or in the place of such defendant's residence. It was also provided that no such leave was to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid; and in practice leave was not granted under that rule without an affidavit shewing that there was no such local Court as mentioned in the rule, and that it was cheaper or more convenient to try the case in England. It was thought that this provision might satisfy the Scotch and Irish members; but it seems probable that pressure was brought to bear by them in order that those whom they represented might again enjoy the privilege of only being liable to be sued in their own country according to the principle "*actor sequitur forum rei.*" It seems to me, therefore, that the result of the strict interpretation of Order XI. rule 1 (*e*), according to the natural meaning of the words, is quite consistent with what we know of the history of the legislation on the subject.

For these reasons, I think that the service made in accordance with the order of Mr. Justice Field must be set aside. I may observe that the learned Judge only made the order for the purpose of raising the question, and I am authorised by him to state that he entirely agrees with our decision.

Service set aside.

Solicitors—Stibbard, Gibson & Co., for plaintiffs; Clarke, Rawlins & Clarke, for defendant.

1883. Nov. 17. } FREEMAN (*appellant*) *v.* NEWMAN (*respondent*).

*Parliament — Registration — Notice of Objection—County Vote—Defect in Notice to Overseers—Incorrect Date—Publication by Overseers—Waiver—*6 *Vict. c.* 18.

A notice of objection to a claim given to overseers in a county, under the provisions of 6 *Vict. c.* 18. *s.* 7, *was dated the* 18*th day of August,* 1880, *instead of the* 18*th day of August,* 1883. *Sufficient notice of objection was given to the claimant, and the overseers duly published a list of objections, including the name of the claimant objected to:*—Held, *that the notice of objection given to the overseers was defective, and that the defect was one which the overseers had no power to waive.*

Case stated by the Barrister appointed to revise the list of voters for the southern division of the West Riding of the county of York.

1. At a Revision Court held at Wakefield on the 2nd day of October, 1883, the appellant, on behalf of William Tritton,

objected to the claim of Charles James Ellis to have his name inserted in the list of voters relating to the township of Alverthorpe-with-Thomas in the said division.

2. The said William Tritton, on the 18th day of August, 1883, gave notice of his said objection to the overseers of the poor of the said township, which notice was as follows :—

"No. 6.

"Notice of objection to be given to overseers.

"To the overseers of the township of Alverthorpe-with-Thomas.

"I hereby give you notice that I object to the name of the person mentioned and described below being retained in the list of voters for the southern division of the West Riding of the county of York.

Christian and surname of the voter objected to as described in the list or register	Place of abode as described	Nature of qualification as described	Street, lane or other like place where the qualifying property is situate, &c., as described in list or register
Charles James Ellis . .	Westgate Common	Freehold houses .	Alverthorpe Road

"Dated the eighteenth day of August, one thousand eight hundred and eighty

"(Signed) Wm. Tritton,

"Of Church Street, Mold Green,

"Huddersfield."

4. Sufficient notice of objection was given by the said William Tritton to the claimant, and the said overseers duly published a list of objections, including the name of the claimant.

Objections, under similar circumstances, were made to the names of seventy other persons being inserted in or retained on the list of voters for the said division, whose names appeared in a schedule to the case.

It was contended on behalf of the claimant that the above notice was insufficient and void in law, inasmuch as the year of our Lord was incorrectly stated in the date thereto.

On behalf of the said William Tritton, it was contended that the said notice was sufficient and valid in law, as the date thereof did not shew that such notice was not given before the 20th of August, 1883, and, further, that any defect in the said notice related to the said overseers only, and was waived by their publishing their lists of objections as aforesaid.

The Revising Barrister found as a fact that the claimant was not inconvenienced or misled by the alleged defect in the said notice of objection, but held, notwithstanding, that the said notice of objection was void in law.

It was admitted that if the said notice of objection were valid, the names of the claimant and the said seventy other persons must be expunged from the list of voters for the said division.

Due notice of appeal was given by the appellant, and the respondent consented to appear for the claimant and the said seventy other persons.

If the Court should be of opinion that the decision of the Revising Barrister was wrong, the names of the claimant and the seventy other persons were to be expunged from the list of voters for the said division.

C. B. Stuart Wortley, for the appellant. —The decision of the Barrister was wrong. In *Jones* v. *Jones* (1), a wrongly dated notice of obejction was held by Mr. Justice Byles to fall within the 101st section, which says that "no misnomer or inaccurate description of any person, place or thing named or described in any . . . . notice required by this Act, shall abridge the operation of this Act with respect to such person, place or thing, provided that such person, place or thing shall be so denominated in . . . . such notice as to be commonly understood. . . ."

As Mr. Justice Byles remarked in the course of his judgment, section 101 "applies where a person means to do one thing and does another—the case here, for the objector meant to insert the true date of the instrument, but has inserted an in-

(1) 35 Law J. Rep. C.P. 94; Law Rep 1 C.P. 140.

correct date." It is true that in *Beenlen* v. *Hockin* (2) it was held that the omission to insert the year in a notice of objection invalidated the notice. That case, however, was decided under a different section, and the terms of section 101 do not appear to have been brought to the notice of the Court.

Again, the overseers had power to waive an irregularity of this kind in the notice required to be presented to them, and did waive such irregularity by publication—*Leonard* v. *Alloway* (3). He cited also *In re Sale* (4) and *Davies* v. *Hopkins* (5).

Mattinson, for the respondent.—The notice was bad, and the Barrister had no power to amend in a county. The statute requires that the notice of objection should be served on the overseers according to a particular form, and it is a condition precedent to the right to object that the form should be complied with. The overseers have no right to waive an irregularity in a notice of objection as against the person objected to.

Stuart Wortley, in reply.

LORD COLERIDGE, C.J.—I regret the decision I am about to give, because it is a decision on a point highly technical and altogether beside the question of merits. But it is plain that the Legislature have not extended the power of amendment to the particular matter in hand. It is true that there is the authority of Mr. Justice Byles that a misdate is a misnomer within the meaning of section 101. I cannot agree with him, for it seems to me that he omits to take notice of the words in the latter part of the section—namely, "provided that such person, place or thing shall be so denominated in such . . . . notice as to be commonly understood."

The other Judges do not base their judgment on the same grounds, but on others, which were, in my judgment, perfectly correct—namely, that the statutory requirements had, in that case, been substantially complied with. Apart from that authority, therefore, what we have to consider here is, whether this notice of objection to overseers, which is admittedly, on the face of it, an inaccurate notice, was invalid. Now Parliament has said that two notices of objection shall be given, the one to the overseers and the other to the party objected to; and describes with particularity what each notice is to contain. The party whose right to vote is objected to has the right to see that all the conditions of the statute have been duly complied with. In the one notice—namely, the one given to the party himself—the statutory requirements have been complied with; but the notice given to the overseers was misdated.

In *Beenlen* v. *Hockin* (2) Mr. Justice Maule gave an important judgment, and decided, with the concurrence of the other Judges, that the omission of the date in the notice of objection was fatal to its validity, or, in other words, that a notice with no date was a bad notice. That case has never been reversed, and it is a decision by Judges of very high authority. I confess I decide in favour of the respondent with regret, because the Revising Barrister has found, as a fact, that the notice was not misleading, but the overseers had no right to waive the defect. The party objected to may waive the objection if he chooses to do so, but it is beyond the power of the overseers to do so as against the party objected to.

HAWKINS, J., and MATHEW, J., concurred.

Appeal dismissed, without costs.

Solicitors—Van Sandau & Cumming, agents for Brooke, Freeman & Batley, Huddersfield, for appellant; Singleton & Tattershall, agents for Newman & Sons, Barnsley, for respondent.

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(2) 4 Com. B. Rep. 19; 16 Law J. Rep. C.P. 49.

(3) 48 Law J. Rep. C.P. 81.

(4) 50 Law J. Rep. C.P. 113.

(5) 3 Com. B. Rep. 376; 27 Law J. Rep. C.P. 6.

[IN THE COURT OF APPEAL.]

1883. Nov. 13, 14. HENRY AND OTHERS (*petitioners*) *v.* ARMITAGE (*respondent*).*

Municipal Elections Act, 1875, *s.* 1. *sub-s.* 2—*Nomination Paper—Misnomer—"Situation of property in respect of which Burgess subscribing is enrolled on Burgess Roll"—Abbreviation of Christian Name.*

The provision of section 1, *sub-section* 2, *of the Municipal Elections Act*, 1875 (*which was repealed by* 45 & 46 *Vict. c.* 50), *that "the nomination paper . . . . shall be in the form No.* 2 *set forth in the schedule to the Act, or to the like effect," is mandatory and not directory; but a nomination paper signed by an enrolled burgess which contains such a description of the property occupied by him at the time of subscribing such nomination paper as will enable a person to refer to the burgess roll to see whether the candidate is nominated by duly enrolled burgesses is a sufficient compliance with the words of the section "to the like effect," even though the qualification of the burgess is in respect of a successive occupation.*

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 165) *reversed.*

The provisions of sub-section 2, *that "the nomination paper shall state the surname and other names of the person nominated," are satisfied if such paper contains an abbreviation of a Christian name which is universally understood as meaning that name and none other: so that a nomination paper which contains the abbreviation "Wm." as meaning "William," is a sufficient statement of the Christian name of the person nominated within the meaning of the sub-section.*

Appeal from a judgment of the Queen's Bench Division upon a Special Case, reported 52 Law J. Rep. Q.B. 165, where the facts are fully stated.

The respondent and one Skinner were the only candidates for the office of councillor of the borough of Sunderland. The nominator of Skinner, a Mr. Young, resided at 6 Belle Vue Crescent; but he had not resided sufficiently long at that house to qualify as a burgess.

The entry of his name and qualification in the burgess roll was as follows:—"638. Young, John, 6 Belle Vue Crescent and Linden Terrace."

Sub-section 2 of section 1 of 38 & 39 Vict. c. 40 provided that "the nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect."

The signatures of the nominating burgesses in the form referred to in the section were printed as follows:—"E. S. of——*." The asterisk referred to a note in the form to the following effect:—"* The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll."

The nomination paper objected to was signed "John Young, of *6 Belle Vue Crescent. Reg. No. 638." The objection taken was that the nomination paper was bad, as the situation of the property in respect of which John Young was enrolled on the burgess roll had not been set out as required by the note to the form given by the Act.

The returning officer allowed the objection.

In the same nomination paper of Skinner, his Christian names were entered as "Wm. Moore." An objection was taken and allowed that the provisions of the sub-section had not been complied with, as the Christian name "William" should have been written in full.

The Queen's Bench Division (Field, J., and Williams, J.), on appeal held, as to the first objection, that the sub-section was mandatory, and that as its provisions had not been complied with, the nomination paper was void. No decision was given as to the second objection.

The petitioners appealed.

MacClymont and *R. L. Wallace*, for the petitioners.

Clarke, Q.C., and *Atherley Jones*, for the respondent.

The Queen v. *Bradley* (1), *The Queen*

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

(1) 3 E. & E. 634; 30 Law J. Rep. Q.B. 180.

v. *Plenty* (2), *Howes* v. *Turner* (3), *Mather* v. *Brown* (4), *Soper* v. *The Mayor of Basingstoke* (5), *Woodward* v. *Sarsons* (6), *Ex parte McHattie* (7), *Gothard* v. *Clarke* (8), *Murray* v. *Mackenzie* (9), *The Queen* v. *Tugwell* (10) *The Queen* v. *The Mayor of Shrewsbury*, cited in *Rawlinson's Municipal Corporation Act*, p. 202 (8th ed.), 5 & 6 Will. 4. c. 76. s. 9; 32 & 33 Vict. c. 55. s. 1; 38 & 39 Vict. c. 40. s. 1, sub-s. 2; 41 & 42 Vict. c. 26. s. 41, were referred to during the argument.

LORD COLERIDGE, C.J.—I am far from saying that my mind is clear on the matter before me; but I have come to the conclusion, not without some hesitation, that the judgment of the Court below cannot be supported.

As to the first point, I have come to a conclusion which is practically decisive of the question upon authority. It seems to me that the case of *The Queen* v. *Bradley* (1) is decisively in point, and I think that we ought to adhere to the decision of a Court of great authority when it is directly in point and there is no overwhelming injustice to make us question or overrule it. I understand that case to have decided that "Wm." was a sufficient statement, within section 14 of 7 Will. 4 and 1 Vict. c. 78, of the Christian name of a candidate called William. I thought at first, and I seem to have been under that impression in the case of *Mather* v. *Brown* (4), that it had been decided in the case of *The Queen* v. *Bradley* (1) that "Wm." was a misnomer—that is to say, that it was not a proper statement of the Christian name, but that it was within the saving section 142 of 5 & 6 Will. 4. c. 76, because the voting paper had contained such a description as would be commonly understood; and, consequently, that the Court of Queen's Bench held that the saving section would apply, and that the voting paper was good. That, however, was to assume that the Court, but for the saving section, would have decided that the voting paper was invalid. If that first view had been correct, the decision would have been in favour of the respondents; but, looking carefully at the judgments, it is clear that it was decided upon another point—namely, that the voting paper did contain a sufficient statement of the Christian name of the candidate under section 14. It appears from the judgment of Mr. Justice Hannen in the later case of *The Queen* v. *Plenty* (2) that the view I am now taking is the right one, and was manifestly the view there taken of the earlier case. I prefer, in a technical case of this kind, to put my judgment upon authority rather than to reason the matter out and to say what would or would not be a sufficient statement of a name within the meaning of the statute. I am well aware that questions may be raised subsequently whether cases are within the principle, but it seems to me to be clear that initials alone will not be sufficient, although "Wm." will do for William, according to the decision in the case of *The Queen* v. *Bradley* (1). I also think that the case of *Mather* v. *Brown* (4) was correctly decided with regard to the subject-matter and authorities then before the Court. The other cases which have been cited are not material, and need not therefore be considered.

As regards the second point, I feel some hesitation whether the description, in the nomination paper, of John Young as of 6 Belle Vue Crescent satisfies the words of the section and sufficiently complies with the form given in the schedule, which I think must be taken to be imperative and not directory. I think, however, that the description is sufficient, upon the ground that it comes within the general words "or to the like effect." A direct test as to what is the real object of this note is given by Mr. Justice Grove in the case of *Gothard* v. *Clarke* (8), where he is

(2) 38 Law J. Rep. Q.B. 205; Law Rep. 4 Q.B. 346, 349.
(3) 45 Law J. Rep. C.P. 550; Law Rep. 1 C.P. D. 670.
(4) 45 Law J. Rep. C.P. 547; Law Rep. 1 C.P. D. 596.
(5) 46 Law J. Rep. C.P. 422; Law Rep. 2 C.P. D. 440.
(6) 44 Law J. Rep. C.P. 293; Law Rep. 10 C.P. 733, 746.
(7) 48 Law J. Rep. Bankr. 26; Law Rep. 10 Ch. D. 398.
(8) 49 Law J. Rep. C.P. 474; Law Rep. 5 C.P. D. 253.
(9) 44 Law J. Rep. C.P. 313; Law Rep. 10 C.P. 625.
(10) 37 Law. J. Rep. Q.B. 275; Law Rep. 3 Q.B. 704.

dealing with this very section, and says that "the object of the provision is, that before the election, persons should see whether the candidate is properly proposed, nominated and assented to by enrolled burgesses." It seems to me that if the nomination paper conveys to persons interested in the election proper information that the candidate is proposed and assented to by persons enrolled as burgesses, the form in the schedule is sufficiently complied with. Here it cannot be doubted that the identity of the nominator, his number on the roll, and the house in which he resided were all stated in the nomination paper; and full information was therefore given to persons interested that he was an enrolled burgess. It appears to me that the object of this provision has been sufficiently complied with in this case, and that the nomination paper was "to the like effect" to the form given in the schedule. The appeal therefore fails as to this objection.

BRETT, M.R.—I am of the same opinion. I must confess that I entertain a stronger opinion than the Lord Chief Justice. I think, not only that the first point was decided by the case of *The Queen* v. *Bradley* (1), but that if I had been one of the Judges I should have been bound to differ if the decision had been the other way. I do not therefore decide this case merely upon authority, but because I am clearly convinced that the present decision is the only reasonable one. Moreover, I do not think that it will be a dangerous decision. The proposition put forward by the appellants is that the statute says that the nomination paper shall state the names. The statute, however, says nothing about the mode in which the name which is to be stated in writing is to be spelt. The question is, whether when that which is to be in writing is in a form which every person who sees it will at once conclude to be a statement of a particular name, and none other, it is a statement of that name. I think that the Judges who decided the case of *The Queen* v. *Bradley* (1) had sufficient knowledge of the world to know that "Wm." is an ordinary way of writing William and no other name, and that persons who are at all accustomed to see names written would say that it was intended for that of William. If so, it is a statement in writing of that name and nothing else.

Therefore the problem is this, whether where the writing contains a mode of writing which everybody would take to mean a name, and one name only, and where it is not written in full, it is not a statement in writing of that name. Other cases have been put forward which it seems to me would not be within the statute. Thus, for instance, "W." would not mean William, not merely because it might stand for something else, such as Walter, but because no one ever understood that "W." alone stood for William, and nothing else. There may be other abbreviations which are equivalent to "William," but it is not for us, upon this occasion, to say what they are. If they comply with the rule that they are universally understood as meaning one name only, then they are sufficient, but not otherwise. For that reason I should have been of opinion, apart from authority, that although the nomination paper does not state "William" in full, it nevertheless does state "William," and nothing else, and is therefore sufficient within the statute.

As to the second question, whether the paper is a sufficient compliance with form No. 2, I agree with the Lord Chief Justice that that form is mandatory and not directory. Further, I think that the effect of the note with the asterisk is to introduce into the form that which is stated in the note as if it had been written in the form. It is necessary, therefore, to describe in the form the situation of the property in respect of which the person who subscribes the nomination paper is enrolled on the burgess roll. The form, being mandatory, must be complied with. I am inclined to think that a person is enrolled in respect of the last property which he is occupying at the time when he is enrolled, and that he is enrolled in respect of that property if he is occupying it in immediate succession to another property in respect of which he is rated and pays rates. Then comes the question whether the situation of the property in respect of which he is enrolled is described to the like effect as if the whole had been

stated. It would be idle to say that the statement of a wrong number would be a statement to the like effect. The question is, whether the description of the property is sufficient. Immediately one says "to the like effect," it seems to me that one must see what is the cause or reason why the thing is required to be to the like effect, in order to see whether what has been done is sufficient. The reason for this, as described by Mr. Justice Grove in *Gothard* v. *Clarke* (8), is that it is not for the purpose of enabling an objector to enquire whether the person is qualified or not at the time of enrolment—for the enrolment cannot be set aside, it being necessary to take that objection at another time and place—but in order that a person who sees the nomination paper may be able to see whether the person is properly nominated and assented to by enrolled burgesses. I will only add this to the proposition laid down by Mr. Justice Grove, that it is to enable a person by a mere comparison of the nomination paper and burgess roll to see, without any further and more laborious comparison, whether the candidate has been nominated and assented to by burgesses duly enrolled. If every one could tell that, then the two things are the same, and the nomination paper would, it seems to me, be "to the like effect." An enquirer is carried at once to the burgess roll, where the nomination paper contains the same number as that borne by the roll, and it seems to me that a man of ordinary sense would not fail to see that the person who signed the nomination paper is the person enrolled, if, upon reference to the entry, he found that one of two properties described was described to be the end of the qualification which the person was occupying at the time when he was enrolled. In such a case the nomination paper would be "to the like effect" within the meaning of the statute.

BOWEN, L.J.—I am of the same opinion. It seems to me that, whether authority or reason be applied, the judgment of the Court below cannot be supported. I think that the first point, as to whether the Christian name is sufficiently stated within the meaning of 38 & 39 Vict. c. 40. s. 1, sub-s. 2, is really concluded by the case of *The Queen* v. *Bradley* (1). It was argued for the respondents that the Court, in that case, might have decided the case by applying section 142 of 5 & 6 Will. 4. c. 76, and by holding that "Wm.", although not a sufficient statement of the name William, so as to be within section 32 of that Act, was nevertheless a misnomer which could be cured by section 142. I agree with that argument. But upon careful consideration of the reports of that case, and also of *The Queen* v. *Plenty* (2), I am of the same opinion as that expressed by the Lord Chief Justice and the Master of the Rolls, that it was in fact decided by the Court that the name William was sufficiently stated by the abbreviation "Wm." It is desirable that persons should not be led into the impression that any abbreviation will be a compliance with the statute. The present decision is only to the effect that "Wm." is equivalent to William, and that it is an abbreviation which every person of ordinary sense would understand to mean William, and which can only be read in that particular way.

As to the second point, whether the name of the nominating burgess had been correctly signed with the addition of the description required by the Act, I agree that the note in the schedule is imperative and must be substantially complied with. I also am of opinion that it was so complied with in this particular case. Here the burgess was enrolled in respect of a successive occupation, but in order to see whether the statute has been substantially complied with, one must consider what was the object of the directions given by the statute. It seems to me to be plain that their object was to enable a person to take the nomination paper to the burgess roll and to see at once whether the person who signed it was upon the roll. If the directions were followed so as to carry out that obvious intention, it would surely be sufficient for a person to give the correct number on the roll, his correct name, and to state that which would not mislead any one into thinking that it was not a sufficient description of the nominator.

Appeal allowed.

Solicitors—T. Balfour Allan, for petitioners; Johnson & Weatherall, agents for Bowey & Brewis, Sunderland, for respondent.

1883. Nov. 27. THE QUEEN *v.* MANLEY SMITH AND OTHERS. *In re* WESTFIELD *v.* THE METROPOLITAN AND METROPOLITAN DISTRICT RAILWAY COMPANIES.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 38 *and* 51—*Disputed Compensation—Costs—Verdict for more than "the Sum previously offered"—Offer increased after notifying Intention to have Jury summoned.*

Promoters of an undertaking authorised by a special Act giving power to take lands otherwise than by agreement, after they had, in pursuance of the Lands Clauses Consolidation Act, 1845, *s.* 38, *given to an owner of lands required by them, on whom they had previously served a notice to treat, notice of their intention to cause a jury to be summoned for ascertaining the compensation to be paid to him, and in that notice offered a certain sum, made a larger offer. A verdict being given for more than the first offer, although less than the second,*—Held, *that, under section* 51, *all the costs of the enquiry were to be borne by the promoters.*

This was a rule, obtained on behalf of Charles Marcus Westfield, calling upon a Master of the Supreme Court of Judicature, and the Joint Committee of the Metropolitan and Metropolitan District Railway Companies, to shew cause why a mandamus should not issue commanding the Master to tax the costs of and incidental to an enquiry between Westfield and the companies, touching a claim by him to compensation in respect of lands required for, and damage to be caused by the execution of certain works, authorised by special Acts relating to the two companies.

The material facts appearing were as follows:—The joint committee of the two companies, appointed under the Metropolitan and District Railways (City Lines and Extensions) Act, 1879, served upon Westfield a notice to treat, dated the 10th of January, 1883, and expressed to be under that Act and later similar Acts, and the incorporated provisions of the Lands Clauses Consolidation Act, 1845, and other general Acts, whereby they gave him notice that they required to purchase or take certain lands, and were willing to treat with him for the purchase of the lands, and as to the compensation to be made to him for the damage which he might sustain by reason of the execution of the works authorised. Westfield, on the 2nd of February, 1883, claimed from the companies 1,987*l.* The companies, by notice dated the 9th of March, 1883, reciting the notice to treat, and that no agreement had been come to for the purchase of the lands required, nor as to the compensation to be made for the injuriously affecting of other lands of which Westfield was the owner, gave notice to Westfield that it was their intention, after the expiration of ten days from the service thereof, to issue their warrant for summoning a special jury for the purpose of ascertaining the amount of purchase-money and compensation to be paid to him; and the companies thereby gave notice that they were willing and thereby offered to give the sum of 600*l.* as and for such purchase-money and compensation (1). Subsequently, on the 19th of March, 1883, the companies served upon Westfield a notice dated the 16th of March, 1883, which, so far as is material, was in the following terms:—

(1) The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), enacts—Section 38: "Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters . . . . shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works."

Section 51: "On every such enquiry before a jury, where the verdict . . . . shall be given for a greater sum than the sum previously offered by the promoters, . . . all the costs of such enquiry shall be borne by the promoters, . . . but if the verdict . . . . be given for the same or a less sum than the sum previously offered by the promoters, . . . or if the owner of the lands shall have failed to appear at the time and place appointed for the enquiry, . . . one half of the costs of summoning, impannelling and returning the jury, and of taking the enquiry and recording the verdict and judgment . . . . shall be defrayed by the owner of the lands, and the other half by the promoters, . . . and each party shall bear his own costs, other than as aforesaid, incident to such enquiry."

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"To Charles Marcus Westfield.

"Referring to the notice to treat dated the 10th of January, 1883, served on you by the . . . . Joint Committee, and also to your notice of claim dated the 2nd of February, 1883, and to the claim of 1,987*l.* therein made by you: The Joint Committee hereby give you notice that they are willing and hereby offer to pay you the sum of 900*l.* as and for the purchase-money and compensation payable to you. . . . And the said committee hereby give you notice that this offer is intended to be and is a formal offer under the Lands Clauses Consolidation Act, 1845."

On the 29th of March, 1883, the companies issued and lodged with the sheriff their warrant for the summoning of a jury; and, by summons of that date, the parties were called upon to appear before the sheriff on the 3rd of April, 1883, for the purpose of nominating a special jury. A special jury was then nominated, and met on the 17th of April, 1883, at the Mayor's Court, Guildhall, in the City of London, the parties attending; and the purchase-money and compensation were assessed by the jury at 750*l.* Application was afterwards made on behalf of Westfield to Master Manley Smith to tax Westfield's costs of the enquiry by virtue of the Lands Clauses Consolidation Act, 1845, s. 51 (1). The Master, however, considered that the sum assessed by the jury being less than the sum which the companies offered on the 19th of March, 1883, although more than the sum offered by the notice dated the 9th of March, no costs of the enquiry other than one-half of the costs specially mentioned in that section could be claimed by Westfield from the companies, and accordingly refused to tax the costs as requested.

This rule having been obtained, for the purpose of compelling the Master to do so,

H. Mathews, Q.C., and *Philbrick, Q.C.* (*Bickersteth* with them), shewed cause.—The sum assessed by the jury being less than the second offer made by the companies was, within the meaning of 8 & 9 Vict. c. 18. s. 51 (1), less than "the sum previously offered." It was clearly open to the companies to amend their first offer, provided they did so in time—*The Metropolitan Railway Company* v. *Turnham* (2), *In re Hayward* (3) and *Fitzhardinge* v. *The Gloucester and Berkeley Canal Company* (4). And they did so in time, their second offer being made before notice was given of the time and place of holding the enquiry, and, indeed, ten days before issuing their warrant for the summoning of a jury—*ibid.*

[LORD COLERIDGE, C.J., referred to *Pearson* v. *The Great Northern Railway Company* (5).]

T. E. Crispe, in support of the rule, was not called upon.

LORD COLERIDGE, C.J.—There are two modes of construing Acts of Parliament. You may either determine for yourself what Parliament might reasonably enact, and attribute to Parliament an intention so to enact, or you may stand by the words which Parliament has used. In my humble opinion the latter is the right mode; if the Legislature is found to have enacted that which is unreasonable, that should, I think, be left to the Legislature to remedy. The intention expressed by the Act which we have now to construe appears to me to be clear; I may add that it appears to me to be also just.

The facts of the case before us are few and undisputed, and are these. The companies served upon Mr. Westfield a notice to treat, and, no agreement having been come to, they, under the Lands Clauses Consolidation Act, 1845, proceeded to give him notice of their intention to cause a jury to be summoned, offering to pay a certain sum, which sum was 600*l.* Having on the 9th of March given that notice, the companies on the 19th of March served a notice, dated the 16th of March, in which, after referring to their notice to treat and to a notice of claim served upon them by Mr. Westfield, they proceeded to offer him the sum of 900*l.* as and for the purchase-money and compensation payable to him, adding that this offer was intended to be and was a formal offer under the Lands

(2) 14 Com. B. Rep. N.S. 212; 32 Law J. Rep. M.C. 249.

(3) 4 B. & S. 787; 33 Law J. Rep. Q.B. 73.

(4) 41 Law J. Rep. Q.B. 316; Law Rep. 7 Q.B 776.

(5) 18 W.R. 259; Law Rep. 7 Q.B. 785*n*.

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Clauses Consolidation Act, 1845. Afterwards the parties proceeded to enquiry before a jury, and the jury awarded only 750*l*. The Lands Clauses Consolidation Act, 1845, saying, by section 51 (1), that when the verdict of the jury is for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of the enquiry shall be borne by the promoters, but if the verdict be for the same or a less sum than the sum previously offered, only a certain portion of the costs is to be thrown upon the promoters, the question has arisen whether the offer made on the 19th of March was an offer within the words "the sum previously offered"; if it was, the companies are in the right and Mr. Westfield is in the wrong.

What is the true construction of the Act? I must own that, but for certain judicial decisions, I should have thought the matter very clear. The Act says, by section 38 (1), that before issuing their warrant to summon a jury for settling a case of disputed compensation, the promoters are to give ten days' notice to the other party of their intention to do so, and in such notice the promoters are to state what sum they are willing to give for the purchase-money and for the damage to be sustained. I should, but for certain judicial decisions, have thought it clear that section 51, in speaking of "the sum previously offered," meant the sum offered in obedience to section 38; I should have thought it both the obvious construction and the reasonable construction. These companies act for their private interest: the interest which the public has in their undertakings is shadowy. It is reasonable that the companies should be required to make an offer which they are prepared to stand by; it is reasonable that the landowner should have an opportunity of taking advice upon the offer made. It is therefore, as it seems to me, reasonable that the words of section 51, "the sum previously offered," should mean (as, according to their natural and obvious construction, they would appear to mean) the sum offered in obedience to section 38.

I am disposed to think that if the promoters of an undertaking were formally to withdraw a notice given by them of intention to issue a warrant for summoning a jury, and were formally to substitute another notice offering a larger sum, that would relieve them from any risk to which they might have exposed themselves, under section 51, by the smallness of an offer contained in the notice so withdrawn. In *Fitzhardinge* v. *The Gloucester and Berkeley Canal Company* (4) Lord Blackburn, then Mr. Justice Blackburn, said, "It may be, for anything I know to the contrary—I am not sure about it, and I do not think the question has ever been decided—that the promoters might send a notice and say, 'We withdraw the notice we have given you of our intention to issue a warrant to the sheriff to summon a jury.' Whether they would have a right to do that or not I do not know; but if they did, and the other side made no objection to it, I should say that the offer they had before made would be withdrawn also." That language I would humbly repeat. But the notice which was given in this case on the 19th of March (dated the 16th of March) was not such a notice. It in no way refers to the notice of the 9th of March, and it therefore, I think, cannot be treated as a notice withdrawing the earlier notice and substituting itself for that.

Doubt has been introduced into the interpretation of section 51 by judicial decisions upon it. Those decisions, however, refer to cases arising under section 68, where the landowner himself initiates the proceedings. I should, if the matter had been *res integra*, have thought the enactment of section 68, that unless the promoters be willing to pay the amount of compensation claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after receipt of the landowner's notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, covered, by the words "in the manner herein provided," the mode of issuing the warrant, and therewith the provisions of section 38. But it has been decided that section 38 is not incorporated with section 68. Section 38 being thus excluded from consideration, the Courts, when the question of costs arose, held (reasonably enough, in my humble judgment) that the words of section 51, "the sum previously offered," must, in their application to cases under

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section 68, be taken to refer to an offer made previously to the ten days' notice of the time and place of enquiry required by section 46 to be given by the promoters to the other party, and that the promoters might accordingly make a good offer up to that time. We are not, however, now dealing with a case arising under section 68, but with a case to which section 38 applies.

I am confirmed in taking that distinction, and also in distinguishing the present case from cases where the costs are governed by section 34 (relating to arbitration), by the decision of Chief Justice Cockburn and Justices Blackburn, Mellor and Lush, after argument by eminent counsel, in *Pearson* v. *The Great Northern Railway Company* (5).

Upon the true construction of the Act, and upon the authority of that case, I am of opinion that this rule must be made absolute.

MATHEW, J., concurred.

Rule absolute.

Solicitors—William Sharp, for claimant; Baxters & Co., for the companies.

[IN THE COURT OF APPEAL.]

1882. July 6. } PRICE AND OTHERS *v.* LIVINGSTONE AND OTHERS.*

Ship—Charter-party—Final Sailing—Last Port.

Where a ship has left her port, ready for her voyage, and for the purpose of proceeding on her voyage, without intending to come back, she must be taken to have "finally sailed," although she may afterwards have been driven back by stress of weather.

A charter-party provided that the ship should take in a cargo at P. Dock, Cardiff, and proceed to Bombay, and that an advance of one third of the freight should be made to the owners within eight days "from final sailing of the vessel from her last port in United Kingdom." The ship took in her cargo and was towed seven or eight miles out to sea, where, owing to bad weather, she anchored. She was afterwards driven from her anchorage, and drifted back into the port of Cardiff. The cargo was jettisoned, and she afterwards took in another. The ship had never been beyond the limits of the port of Cardiff, as defined for fiscal purposes, though she had left the port in its ordinary commercial sense:—Held, *that she had "finally sailed from her last port."*

* *Coram* Jessel, M.R.; Hannen, Sir J., and Lindley, L.J.

This was an appeal from a decision of Lopes, J.

By a charter-party dated the 12th of October, 1880, W. R. Price & Co. chartered to Livingstone, Briggs & Co. the ship *Buckhurst.*

The charter-party was on a printed form having blank spaces which were filled up in writing. It ran as follows (the words in italics being in writing):—"It is this day mutually agreed between *Messrs. W. R. Price & Co.*, owners of the good ship or vessel called the *Buckhurst*, and classed 100 A 1 of the measurement of *1,850* tons or thereabouts now *building* in the port of *Dumbarton*, and *Messrs. Livingstone, Briggs & Co.*, merchants, that the said ship being warranted tight, staunch and strong, and classed as above during the voyage, shall with all possible dispatch proceed to *Penarth Dock, Cardiff*, and after being in a loading berth . . . . shall then load a full and complete cargo of steam coals as ordered by charterers which they bind themselves to ship, &c., &c., and being so loaded shall proceed to *Bombay*, or so near thereunto as she may safely get, and deliver the same, &c., &c., the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the sea, rivers and navigation during the said voyage always mutually excepted. The freight to be paid on the quantity delivered at and after the rate of *twenty-one shillings and sixpence* per ton of 20 cwt. or at the option of the agent of the P. and O. Steam Navigation Company at the port of discharge on the quantity shipped . . . . such freight to be paid as follows:—An advance of *one third* by charterers' acceptance at *three* months date and *one third at six months date* from final sailing of the vessel from her last port in United Kingdom, clean bills of

lading on charterers' form for the cargo having been previously signed by the master and handed to the charterers, or, at their option, in cash within eight days from sailing under discount at bank-rate, but not under five per cent. per annum."

On the 16th of January, 1881, having taken in a full cargo at Penarth Dock, the ship was towed by a steam-tug seven or eight miles out into the Bristol Channel, when the weather being threatening, the captain determined to anchor.

On the 18th, owing to the violence of the weather, the ship was driven from her anchorage and drifted on to Penarth Beach. The cargo was jettisoned, or damaged by sea water, and could not be carried to Bombay.

Price & Co. brought an action against Livingstone & Co. to recover 1,056*l.*, being one third of the freight, and the defence raised was that the vessel had never finally sailed from her last port in the United Kingdom. For fiscal purposes the port of Cardiff extends beyond the farthest point to which the ship was towed, and the point where she was beached was within the limits of the port in the ordinary sense. Lopes, J., held that she had finally sailed, and Livingstone & Co. appealed.

Hollams, for the appellants.—The ship never really sailed from the port of Cardiff. She never got beyond the limits of the port as defined in the *Gazette*, and she was actually driven back into the port in its popular sense. The words "last port" in the charter-party are used in their widest sense, and include any port in the United Kingdom into which the ship might be driven by bad weather.

[SIR JAMES HANNEN referred to *Roelandts* v. *Harrison* (1) as to the limits of the port of Cardiff.]

A. L. Smith, for the respondents, referred to *Hudson* v. *Bilton* (2) as to the meaning of final sailing, but was not called upon to argue.

JESSEL, M.R.—This case raises a very simple point on a charter-party, which is partly in print and partly in writing. The clause in question is in print. [His Lordship read the material parts of the charter-party, and continued:] The question is, what do the words mean. Stress has been laid on the words "last port," but I am not much struck by them. If only one port is mentioned, it might be more correct to strike out the word "last" from the printed form; but if there is only one port, it must be both first and last, so I do not think that any stress is to be laid on the expression.

The form is printed for convenience, and, if necessary, is intended to be altered to suit the circumstances. The use of the word "last" does not necessarily imply that there is more than one port. The question then is, what is meant by sailing from the last port. The word "port" is doubtless used in its ordinary commercial sense. The port of Cardiff for ordinary commercial purposes must not be treated as extending seven miles out to sea. The vessel was towed out into the Bristol Channel for a distance of seven or eight miles from the port in its ordinary commercial sense. The question is, had she finally sailed. The argument is that because she stranded she did not finally sail. The answer to that is that she had finally sailed as soon as she had left the port for the purpose of proceeding on her voyage without any intention of coming back. It cannot be contended that she had not "sailed" merely because she was in tow. According to that, she might have proceeded 200 miles upon her voyage, and yet be construed as not having finally sailed. I am of opinion that the decision appealed from is right.

SIR JAMES HANNEN.—I am of the same opinion. The case of *Hudson* v. *Bilton* (2) suggests the meaning of "final sailing"; the vessel must have left the port ready for her voyage, and for the purpose of proceeding on her voyage. In that case the ship had not got her papers on board; but here everything was complete, and but for her having stranded she would have gone on her voyage. The fact that she was driven back by stress of weather does not entitle us to say that she had not finally sailed. Then as to the words "last port." The charter-party only provides for her touch-

(1) 9 Exch. Rep. 444; 23 Law J. Rep. Exch. 169.

(2) 6 E. & B. 565; 26 Law J. Rep. Q.B. 26.

ing at one port—namely, Cardiff; therefore that was her last port. It has been suggested that, as she was driven back, the port into which she was driven was her last port, and that she never sailed from it; but in that case there would be no time fixed for the commencement of the contract. The port from which a vessel starts intending to go on her voyage is her last port.

LINDLEY, L.J.—I also think that the decision of Mr. Justice Lopes is quite right. The question is, whether this ship had finally sailed from her last port in the United Kingdom. The words "final sailing" are followed a few lines lower down by the word "sailing," which in this charter-party seems to be an equivalent term. If we ask ourselves whether she had *bona fide* started on her voyage, we must come to the conclusion that she had. When a ship is seven or eight miles out at sea she must be said to be out of port. As to the word "last," I think that the charter-party being in print is intended to be altered if necessary, and therefore no great weight is to be attached to the word.

Solicitors—Hollams, Son & Co., for appellants; Parker & Co., for respondents.

1883. Dec. 10.

LEIGH *v.* DICKESON.

Tenancy in Common — House — Liability for Repairs—Holding over after the Expiration of a Lease from one Tenant in Common, and the Purchase of the Interest of the other.

One tenant in common of a house is not entitled to recover from another tenant in common, in virtue of their relation, money laid out in the repair of the house, but not for the purpose of preventing the destruction of the subject-matter of the tenancy.

The assignee of a lease from a tenant in common seised of an undivided three-fourths of a house, which assignee afterwards purchased the one-fourth share of the other tenant in common, and continued in possession of the house after the lease had expired, held *liable to pay to the lessor, by way of use and occupation, the rent reserved in the lease, his occupation of three-fourths of the house being, in view of the correspondence, referable to his character as tenant on sufferance after the expiration of the lease, and not to his character as tenant in common.*

Further consideration before Pollock, B.

Grantham, Q.C., and *Gore*, were for the plaintiffs.

Finlay, Q.C., and *C. A. Russell*, for the defendant.

The facts and arguments sufficiently appear from the judgment.

POLLOCK, B.—This action was brought by the plaintiffs, as trustees of Mrs. Eyles, to recover from the defendant the sum of 24*l.* 9*s.* 6*d.*, which they allege to be due to them from the defendant for the use and occupation by the defendant of three-fourths of premises in Market Lane, Dover, for 264 days, and also three quarters' rent of a piece of land and buildings at the rear of the above. With regard to the second claim, the amount of it was tendered before action, and has been paid into Court, and therefore no question now arises with respect to it. As to the claim in respect of the three-fourths of the above premises, the case was heard before me without a jury at the Lewes Assizes, and afterwards upon further consideration, when the following facts were agreed upon by counsel.

In 1860 Mrs. Eyles (then Mrs. Worger) was entitled to an undivided three-fourths of the house in Queen Street, Dover, as tenant in common with another; and on the 4th of January in that year Mrs. Worger, by lease, let to one Prebble for twenty-one years her interest, at the rent of 33*l.* 15*s.* per annum. This lease contained a covenant on the part of the tenant to execute internal repairs, and on the part of Mrs. Worger to execute external repairs. In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871 the defendant purchased the one-fourth interest of the other tenant in common. On the 6th of January, 1881, the lease expired, and the defendant con-

tinued in possession. A correspondence then took place between the plaintiffs and the defendant and their solicitors with a view to continue the tenancy, but the plaintiffs asking for an advanced rent, which the defendant was unwilling to pay, no further agreement was effected. On the 15th of February, 1882, the present action was commenced, the plaintiffs claiming for use and occupation since the expiration of the lease. It was also admitted that upon the 24th of January, 1881, proceedings had been taken by the plaintiffs against the defendant in the County Court of Kent. These do not, however, appear to me to be relevant to the claim in the present action, and therefore I make no further reference to them.

On behalf of the defendant it was contended that the action would not lie, because one tenant in common cannot sue another tenant in common for the rent of premises owned by them. It is, however, unnecessary to deal with this general proposition, because in the present case a claim is made by the plaintiffs against the defendant, not simply to recover the value of premises occupied by him as tenant in common, but it is brought for the use and occupation of the three-fourths of the premises which were let by the plaintiffs' *cestui que trust* to Prebble in 1860 by a lease, which was afterwards assigned by Prebble to the defendant, who entered and paid rent. Having carefully considered the correspondence that passed between Mrs. Eyles and her solicitors and the defendant and his solicitors, I have come to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. Now it is quite clear from the authority of Lord Coke (1), which was adopted by the Court in *Cowper* v. *Fletcher* (2), that one joint tenant may let his part for years or at will to his companion; and I think it is equally clear that, if after the expiration of such a lease the tenant holds over, the same consequences must be taken to follow as would arise in the case of a lease between strangers, and that the lessor would have a right to treat the defendant as a tenant at sufferance for the period during which he held after the expiration of the lease, and to sue him for use and occupation in respect thereof. If any authority were required for this, the case of *Bayley* v. *Bradley* (3) seems to suffice.

Looking, therefore, at the case in this light, my judgment will be for the amount claimed, 24*l.* 9*s.* 6*d.*—being the amount recoverable for 264 days' occupation, at the same rate as was reserved by the lease.

This disposes of the plaintiff's claim.

The defendant, however, by way of counter-claim, charges the plaintiffs with a sum of 80*l.*, which he alleges he laid out and expended in substantial and other proper repairs and improvements upon the premises since the expiration of the lease. With regard to this claim, it is first to be observed that it is made, not in respect of any breach by Mrs. Eyles or her trustees of the covenant contained in the lease, but for what are called substantial and proper repairs and improvements. To this set-off and counter-claim the plaintiffs demur, and it was admitted by counsel that if the demurrer should be overruled, the defendant was entitled to judgment upon the counter-claim—so that any question of amount, and any distinction which might be taken between repairs and improvements, is apparently waived, and the question is broadly raised whether, having reference to the legal relation which existed between the parties, the plaintiffs are liable to recoup the defendant for money so laid out by him in repairing the premises, in the absence of any express contract. There is, however, nothing to shew that the repairs were of such a nature that but for them the subject-matter of the tenancy in common would have perished, so as to bring the case within the principle of those decisions in which it has been held that where an outlay is in the nature of salvage all interested in the thing saved are bound to contribute.

No case or authority was cited by counsel to shew that, going back for a

(1) Co. Lit. 186*a*.

(2) 6 B. & S. 464; 34 Law J. Rep. Q.B. 187.

(3) 5 Com. B. Rep. 396; 16 Law J. Rep. C.P. 206.

long period of years, effect has ever been given by the Courts to a claim by action by one tenant in common against another for money which had been expended upon the repair of their common property; nor have I been able to find any such case or authority, although the claim deals with a matter of common occurrence, and the question must often have arisen, if the defendant's contention be correct. It becomes necessary, therefore, to refer to the older law, and to see upon what principle any claim of a like nature has been rested, and how far, if at all, it would govern in a case like the present. The writ by one of two tenants in common against the other *de reparatione facienda* is mentioned by the earlier law writers. Coke, in his *Commentary upon Littleton* (4), speaks of it thus:—"If two tenants in common, or joint-tenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur*; whereby it appeareth that owners are in that case bound *pro bono publico* to maintaine houses and mills which are for habitation and use of men."

The right to this writ is also mentioned in almost similar terms in *Lewis Bowles' Case* (5), where it is said:—"If there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood, or corn; but if there be two joint-tenants of an house, the one shall have a writ *de reparatione facienda* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur.*" Similar statements of the law will be found in 2 *Co. Inst.* 402, and *Moor's Rep.* 374. The writ is also mentioned in 2 *Cruise's Dig.* 377, as a common law writ.

The later authorities in substance adopt these two, and refer to them in much the same language. It is curious to observe that the remedy between the joint tenants is spoken of as if it was one which existed rather for the benefit of the community than of the joint tenant; but what is more to the purpose is to notice that in these passages, and in the books in which the form of the writ itself is given, as in *Fitz. N.B.*, p. 127, and the *Registrum Brevium*, p. 153*b*, the writ is to be found amongst those which require acts to be done by way of reparation, such as the repairing of mills either by the county or by an individual who is liable, the repairing of a bridge, wall, road, sewer or pavement, the repairing by a neighbour of his house which is so in decay as to be dangerous; and in all these cases the ground of the claim seems to be such as to pre-suppose that the condition of the thing to be repaired would be dangerous or useless unless the repairs in question were effected. This procedure differs widely from the right alleged in the present case of one tenant in common to expend money in the ordinary repairs of a house, and then recover from his co-tenant his share. In *Dering* v. *Lord Winchelsea* (6), Chief Baron Eyre, speaking of the right to contribution among sureties, mentions the case of tenants in common, and refers to the writ in *Fitz. N.B.* He speaks of contribution generally as being founded upon an equitable right based upon general principles; and in the recent case of *Leslie* v. *French* (7) this *dictum* was cited by counsel, but I do not find that it received any assent in the judgment of Lord Justice Fry; and in neither of these cases—one being a claim between co-sureties, and the other a claim between co-owners of a policy of insurance—was it necessary to consider what was the law as applicable to tenants in common.

In *Story's Eq. Jurisp.* s. 1235, the subject is treated of, and the writer refers to some cases which have arisen in the Courts of America, but the only one which bears upon the question now before the Court is that of *Converse* v. *Ferre* (8), in which Chief Justice Parker says that: "At common law no action lies by one tenant in common who has expended more than his share in repairing the common property against the deficient tenants;" and he goes

(4) Co. Lit. 200*b*.
(5) 11 Rep. p. 82.
(6) 1 Cox, 318.
(7) 52 Law J. Rep. Chanc. 762; Law Rep. 23 Ch. D. 552.
(8) 11 Mass. Rep. 326.

on to say that for this reason the Legislature of that State provided a remedy, which was applicable, however, to mills only.

An interesting judgment by Chancellor Kent upon the subject of contribution will be found in the case of *Campbell* v. *Mesier* (9). A bill was filed by one of two owners of adjoining houses separated by a party wall. It was an old party wall between the two houses, and the owner of one of them being desirous to build a new house on his lot, pulled down the old house, and with it the party wall, which was ruinous, and rebuilt it with his new house. The owner of the adjoining house and lot was held to be bound to contribute rateably to the expense of the new wall of partition.

The particular case was decided expressly upon the ground that it was absolutely necessary to have the wall rebuilt, and therefore it furnishes no authority for the right to contribution where ordinary repairs are done. In the course of the judgment Chancellor Kent refers to *dicta* expressed by different writers upon the civil law. One of these, Papinian (10), states it as a rule of the civil law, that if one part-owner of a house in decay repairs it at his own expense, upon the refusal of the others to unite in the expense, he can compel them to contribute their proportion, with interest, or upon their default, at the end of four months, the house, at his election, becomes his sole property. This would seem only to apply to the case of such decay as would, if not arrested by repair, produce ruin.

Pothier, speaking of party walls (11), accords the right to contribution for the rebuilding of a party wall only where it is ruinous and needs to be rebuilt independently of the raising of it by the part-owner on one side.

I was referred during the course of the argument to a form of order which is to be found in *Seton's Decrees*, vol. ii. 1024, wherein an enquiry is directed as to what, if any, substantial repairs have been done by one or more of several tenants in common. This occurs in an order made in a suit for partition and sale, in which it is obvious the direction would be necessary, quite apart from such a right as is insisted upon by the defendant in the present action.

At common law no action of account lay by one joint tenant or tenant in common against his co-tenant. By the statute of 4 Anne, c. 16. s. 27, a tenant in common could be charged by his co-tenant in an action at law as bailiff for money received, a share of which the plaintiff was entitled to. The same end could also be better attained by a bill in equity. The history of the action of account will be found in *Viner's Abridg.*, "Account," and under the same title in *Selwyn's Nisi Prius.*

Except, however, in the case of a bill for partition, I can find no trace of any action or claim in equity for contribution in respect of money expended for repairs.

This being the state of the authorities, the conclusion I arrive at is that the defendant has failed to establish his counter-claim against the plaintiffs. It may be said that this leaves the defendant to bear the cost of repairs which in equity and fair dealing ought to be borne in part by the plaintiffs. There is something no doubt in this argument, but it must be remembered that the relation which exists between tenants in common is peculiar. In cases where the money expended is for ordinary repairs, and not such as are absolutely necessary for the prevention of ruin, the inconvenience of taking an account between the co-tenants whenever one has paid more than his share would be great, and in almost every case in which they are unable themselves to agree as to what repairs are needed, and how the cost of them should be divided, the only efficient remedy would be attained by a partition.

There will be a verdict and judgment for the plaintiffs upon the claim for 24*l.* 9*s.* 6*d.*, and also upon the counter-claim, with costs.

Solicitors—Palmer & Bull, agents for Lamb & Evett, Brighton, for plaintiffs; Bower, Cotton & Bower, agents for J. Stillwell, Dover, for defendant.

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(9) 4 Johns. 334.
(10) Dig. 17, 2, 52, 10.
(11) Contract de Société, Première Appendice, No. 199, 203.

[IN THE HOUSE OF LORDS.]

1883. July 20, 23. THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY *v.* BROWN.

Railway Company—Special Contract for Carriage of Goods at Owner's Risk—Reasonableness—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

The fact that there are ordinary rates in practical operation on a railway for the carriage of goods with ordinary liability is very strong evidence that an agreement between the railway company and a customer for the carriage of goods at another rate is reasonable.

A customer, having a bona fide alternative of sending his goods at ordinary rates, by a contract in writing agreed to free and relieve a railway company "from all liability for loss or damage by delay in transit, or from whatever other cause arising," in consideration of the company carrying his goods at a rate one-fifth lower than the ordinary rate:—Held, *that the contract was reasonable, and relieved the company from liability from loss through delay in transit caused by the negligence of their servants.*

This was an appeal from a judgment of the Court of Appeal, which reversed one of the Queen's Bench Division. The case is reported in the Courts below 51 Law J. Rep. Q.B. 599; 52 ibid. 132; Law Rep. 9 Q.B. D. 230; ibid. 10 Q.B. D. 250.

The facts, which were found in a Special Case stated by a County Court Judge for the opinion of the Queen's Bench Division, were as follows:—

The plaintiff was a fish merchant of Great Grimsby, and had been in the habit for some years of consigning live codfish to the defendants for transport to Billingsgate market.

On the 28th of December, 1880, the plaintiff signed the following "risk note":—

"Manchester, Sheffield and Lincolnshire Railway.

"Risk Note.

"Grimsby Dock Station,

"Dec. 28, 1880.

"Sir,—I beg to inform you that, to parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted.—I am, sir, for and on behalf of the company, your obedient servant,

"James Reed."

"December 28, 1880.

"Sir,—In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to remain in force from the present date until December 31, 1885.—I am, sir, your obedient servant,

"Henry William Brown."

"Mr. Reed, Grimsby Dock Station, Manchester, Sheffield and Lincolnshire Railway Company.

"Witness, W. H. Watkinson."

With the exception of the signatures, date and address, the above was in a lithograph form, furnished by the defendant company.

In accordance with this undertaking, all fish was from that date forwarded for the plaintiff at the lower rate.

On the 13th of April, 1881, two days before Good Friday, the quantity of fish delivered by the fish merchants at Grimsby for transit by the defendants' lines to London was much in excess of the ordinary amount; but no consignments were refused by the defendant company, nor special provision made nor steps taken for the sending off the vans of fish in such time as that they should reach Billingsgate market as usual; nor was any notice or warning given to the plaintiff, who accordingly, instead of keeping his fish alive till they could be sent off, stunned them as usual, and packed them ready to be sent off.

The plaintiff's fish, in consequence of not being sent off till 3.25 a.m. on the 14th of April, instead of by the 8.40 p.m. train on the 13th, were too late for the Billingsgate market, and the plaintiff suffered loss thereby.

Manchester Rail. Co. v. *Brown*, *H.L.*

The County Court Judge held that the defendant company had failed to justify the delay which had taken place in delivering the fish consigned to them for carriage, and that they were not protected by the "risk note" which the plaintiff had signed, and thereupon directed judgment to be entered for the plaintiff for 1*l.* and costs.

The judgment of the County Court Judge was reversed by the Queen's Bench Division, but restored by the Court of Appeal.

The company appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*) (*Gully, Q.C.*, and *C. A. Russell* with him), for the appellants.—The plaintiff had two alternative rates open to him—the ordinary rate, with complete liability of the company as common carriers, and the reduced rate under the special contract. The reduction in rate was probably a fair equivalent for the increase in risk. There is no evidence that it was not, and the fact that some customers of the company had their goods sent at the one and some at the other rate is evidence that the alternative was a fair one. If, then, the plaintiff, a sane man of full age, chose to sign the risk note, there is nothing in the case to induce the House to say that his contract was unreasonable within section 7 of the Railway and Canal Traffic Act, 1854. There is no reason why the company should not contract themselves out of the consequences of the negligence of their servants, if the other party assents; and there is no compulsion on him to do so. In *Peek* v. *The North Staffordshire Railway Company* (1) there was no alternative, and the judgment went on that ground—*Simons* v. *The Great Western Railway Company* (2), *Lewis* v. *The Great Western Railway Company* (3), *Allday* v. *The Great Western Railway Company* (4), *Rooth* v. *The North Eastern Railway Company* (5) and *Moore* v. *The Great Northern Railway Company* (6).

(1) 10 H.L. Cas. 473; 32 Law J. Rep. Q.B. 241.
(2) 18 Com. B. Rep. 805; 26 Law J. Rep. C.P. 25.
(3) 47 Law J. Rep. Q.B. 131; Law Rep. 3 Q.B. D 195.
(4) 5 B. & S. 903; 34 Law J. Rep. Q.B. 5.
(5) 36 Law J. Rep. Exch. 83; Law Rep. 2 Exch. 173.
(6) 10 Ir. Law Rep. Q.B. D. 95.

The Court of Appeal held that the plaintiff had no option, because he was forced by competition to send at the lowest rate. But if the reduction in charge is the equivalent of the increased risk the two rates are in fact equal; if it is less than an equivalent the ordinary rate is in fact the lower, and the plaintiff would gain an advantage by using it; if it is more than an equivalent the plaintiff has no right to accept the benefit and repudiate the loss.

If the contract would not excuse the company from liability for misconduct it may be still good as to negligence—*Robinson* v. *Ommaney* (7), *Green* v. *Price* (8), *Finlay* v. *The North British Railway Company* (9) and *Hearn* v. *The London and South Western Railway Company* (10).

Webster, Q.C., and *Bray*, for the respondent.—This contract does not extend to liability for negligence. In order to do so it must expressly so provide. Mere general words, "from whatever other cause arising," would not include the case of negligence—*Phillips* v. *Clark* (11), *Czech* v. *The General Steam Navigation Company* (12), *Steel* v. *The State Line Steamship Company* (13) and *Beal* v. *The South Devon Railway Company* (14).

If the contract did extend to negligence it was unreasonable. In that case it must have also covered wilful misconduct. Without an alternative the contract would have been clearly bad, and here the alternative was not a practical one. Even if it be admitted that there was a practical alternative, that is not sufficient ground for holding the contract good. The House must examine the terms and see that they are reasonable—*Peek* v. *The North Staffordshire Railway Company* (1), *McConnachie* v. *The Great North of Scotland*

(7) 52 Law J. Rep. Chanc. 440; Law Rep. 23 Ch. D. 285.
(8) 13 Mee. & W. 695; 16 ibid. 346; 14 Law J. Rep. Exch. 105; 16 ibid. 108.
(9) 8 Sess. Cas. (3rd series) 959.
(10) 10 Exch. Rep. 792; 24 Law J. Rep. Exch. 180.
(11) 2 Com. B. Rep. N S. 156; 26 Law J. Rep. C.P. 168.
(12) 37 Law J. Rep. C.P. 3; Law Rep. 3 C.P. 14.
(13) Law Rep. 3 App. Cas. 72 (Scotch).
(14) 3 Hurl. & C. 337.

Railway Company (15) and *Jarvie* v. *The Caledonian Railway Company* (16).

LORD BLACKBURN.—I do not think that we need trouble the Solicitor-General to reply. The case has been argued at great length, and is one of importance. There has been a unanimous judgment of the Court of Appeal reversing the judgment of the Divisional Court; but as we have heard the arguments at such length I do not think that there is occasion to take time to consider our decision.

The first thing to be looked at is, What does the contract in this case set out? The appellants say, "To parties willing to free and relieve this company and the other railway companies over whose lines fish may be forwarded from any of our stations from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted." The party on the other side, the fishmonger, says, "I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage." The first question which arises is, Supposing that the Railway and Canal Traffic Act were repealed and that we were considering the case free from any difficulty about that Act, would the effect of this contract be to protect the company from the damage which is claimed in this case? It is said that it would not, on two grounds. First, Mr. Webster endeavoured to argue that here the damage was not from any loss or damage or delay in the course of the transit, but was from misconduct on the part of the company in not warning the respondent, before he killed his fish and sent them to the station, of the delay which would arise if he sent them, and that was a cause of action. Next, it was said that such a contract ought to be construed (whatever the parties meant) not to include protection to the company from the negligence of themselves or their servants, that we are forcibly to construe it in that way, though the intention of the parties might be to the contrary. Now there was some ground for maintaining that argument. *Wyld* v. *Pickford* (17) (I think it was) certainly did seem to state that a party in that position was entitled to say that the contract was to be so construed. But then I think *Hinton* v. *Dibbin* (18), now about forty years ago, decided quite the contrary; and there have been a great many cases since, all proceeding upon the same principle. I believe that most of them are referred to in the opinion which I delivered in the House of Lords in the case of *Peek* v. *The North Staffordshire Railway Company* (1), and the result was what I pointed out, that such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants as well as from all other damage. I do not think that it would protect them against a misdelivery—probably it would not—and certainly not against the company wilfully destroying the goods, or taking them away, or selling them, or doing anything of that sort. That would not come within it. All the other cases of injury producing damage from the negligence of their servants I think are protected, for the reasons which I gave then, which I see were adopted by Mr. Justice Crompton in terms, and which I think were substantially adopted by the then Lord Chancellor, Lord Westbury, when he came to give his judgment.

Mr. Webster argued that the case of *Phillips* v. *Clark* (11) and other cases of that kind were inconsistent with that view. I do not think that they are so at all. I think that the reasoning of those cases is this: when an exception is made, and the carrier agrees to take the goods, the perils of the seas excepted, the question is, What is excepted? Custom and ordinary usage say, in bills of lading when the goods are going by sea, "perils of the seas excepted." Well, he is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods travelling in his ship would not be entitled

(15) 3 Sess. Cas. (4th series) 79.
(16) 2 Sess. Cas. (4th series) 623.
(17) 8 Mee. & W. 443; 10 Law J. Rep. Exch. 382.
(18) 2 Q.B. Rep. 646; 11 Law J. Rep. Q.B. 113.

to say, "I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage." And so of leakage, and many other things of that sort. But that does not in the slightest degree shew that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of the servants in the receipt and carriage and delivery of the goods.

Passing from that point, we come next to the question whether this contract is made void by the Railway and Canal Traffic Act. There was a great deal of opposition to that Railway and Canal Traffic Act when it was first passed, and many people said that it was most unjust, and so on; but it was ultimately decided in *Peek* v. *The North Staffordshire Railway Company* (1), that it is valid and effectual until the Legislature choose to repeal it, to this extent, that contracts, even though signed (which they must be to be valid, and as this contract is), are void if they purport to free a railway or canal company from responsibility for the negligence of their servants, unless they are adjudged reasonable by a Judge or a Court. And the question comes to be here, What are the grounds upon which a Court (which your Lordships now are for that purpose) is entitled to consider whether this contract is reasonable or not, and what are you to adjudge upon it? Now on that subject we have certainly an alternative, for in the very terms and on the face of the contract it is said, "The company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted." So that it is quite clear upon the face of the contract that there is to be a reduction of one-fifth, twenty per cent., from the rates actually charged, if the parties choose to avail themselves of it. I do not think that the mere fact of its being said that there is another charge would be of itself sufficient to make this contract reasonable. The spirit and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal* v. *The South Devon Railway Company* (14). "The real question," says Mr. Justice Crompton, in delivering the judgment of the Exchequer Chamber, "is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly." The mischief was supposed to consist in giving a practical monopoly to the railway companies by compelling people to enter into contracts whether they willed it or no. The Act says, "If you have signed a written contract expressing a certain condition, a Judge or a Court shall see whether it is reasonable or not." Mr. Justice Crompton says, and I think rightly says, that in order to judge whether it is reasonable or not you must look at this consideration, Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of that monopoly?

Now I think it will be seen that in this case there was really a reasonable means of the goods being carried, and that the company offered to fulfil their duty as common carriers in saying, "We will carry all goods that are brought to us, fish and otherwise, on being paid a reasonable remuneration—we will carry them according to the custom of the English realm, and will safely deliver the goods, unless certain excepted things prevent their being so delivered." There is superadded that which is not part of the custom of the realm, also an obligation to use reasonable care and reasonable skill to deliver the goods within a reasonable time. That is superadded, I think, by the law to the duty which by the custom of the realm is cast upon a carrier; there is that duty to deliver with reasonable despatch and without unreasonable delay. Now upon that, if the company have really offered and said, and do in fact say, "We will carry your goods, subject to this liability, on payment of a reasonable price," I myself think (although it seems to be treated as an absurdity to reason in that way) that so long as they are offering and are willing to carry at a reasonable price and to fulfil their duty, it cannot be unreasonable to say, "If you prefer your goods being carried on other terms we will agree to it." Whatever these contracts are, the parties are not left at arm's

length, and the mischief which the Railway and Canal Traffic Act supposed to exist, of individuals and the public being coerced by a practical monopoly, does not arise, for they can have their goods carried according to the terms of the common law without being called upon to pay anything more than a reasonable remuneration.

Now I am not prepared to say that where there are maximum rates fixed, as no doubt there are on this railway, everything within these maximum rates must be a reasonable remuneration. I do not say whether that is so or not. That may be a matter worthy of consideration in some other case. But I do say this, that when there has been a rate fixed, if it be shewn in point of fact that although people can have their goods reasonably carried at that rate, they do enter into agreements of this sort to have them carried at another rate, that is extremely strong evidence that the agreement is reasonable, and I should think that no Court would fail so to find it if that evidence was produced before them. Now in this case, which is said to be a representative case, that statement is of importance; but it does not appear to have occurred to the learned Judge of the County Court nor to the people there to consider the point whether or no the ordinary rates—that is to say, the rates twenty-five per cent. higher than the rates charged under this contract—were in fact practically operative in the way I have just mentioned. If they were positively deterrent and merely illusory, and if no fish whatever were sent in that way, it must have been perfectly well known by every one of the fishermen in Grimsby, and perfectly well known I should think to the County Court Judge. If they were in practical operation, and if fish were carried at those rates, that also would be well known. I dare say that if it had occurred to any one that that fact was of importance, there would not have been any difficulty about stating it; but it does not seem to have occurred to any one that it was so, and all that we have really is that the plaintiff himself, after being asked in cross-examination whether he did not make a profit by the risk note, incidentally says in re-examination, "I know personally the course of practice in sending fish by persons who sign risk notes. Such persons send their fish if they wish to do so on the ordinary terms by sending it in somebody else's name." Now it is wonderful that in such a case as this the point should be reduced to that very little piece of evidence; but on that evidence of the plaintiff himself stating that he personally knows that to be the course of business, I can form no other conclusion, and I do not think your Lordships can form any other conclusion, than that those ordinary rates, as he calls them, are in practical operation, the railway company finding customers at them, and persons coming at those rates; and that being so, I do not think that any Judge ought to ask for stronger evidence than that to enable him to say that there was a real *bona fide* alternative in this case. And Lord Justice Lindley seems to agree that if he could have come to the conclusion which I have said that I have come to—namely, that there was such a *bona fide* rate—he would have thought that this contract was reasonable enough. But the other two Judges in the Court of Appeal, Lord Justice Baggallay and Lord Justice Brett, seem to argue (as far as I can understand what they say) in this way, that nothing can be reasonable practically between the railway company and the trader, because if the trader does not take the best bargain, and does not choose to do the best thing, he will be undersold by others; so that the trader, no matter whether he is dealing with a railway company or with anybody else, never can be a free agent; if it is a carrier by water, the trader is not a free agent, and must send his goods on the cheapest terms that he can without being a free agent. That, to my mind, is not legitimate reasoning.

LORD BRAMWELL.—Lord Justice Lindley says so too. He says, "In the case now before the Court the plaintiff was a fish merchant sending his fish to market, and practically he was compelled to send his goods at the lower rate. It is true he was not compelled to do so by the defendants, but it is plain that unless the plaintiff sent his fish as cheaply as he could he

would be undersold in the market by his competitors in trade" (19).

LORD BLACKBURN.—If it be a carrier by water, or a carrier by land where there are no railways, the trader may make a bargain with that carrier if he pleases. It might as well be argued that he is in the same position as he was before the Railway and Canal Traffic Act was passed, without remedy. But then it is said by the Legislature in that Act, "Inasmuch as railway and canal companies have a practical monopoly given to them by virtue of their powers, we will protect you against the abuse of that practical monopoly." And I think that that is accurately expressed in the case of *Beal* v. *The South Devon Railway Company* (14) in considering whether the condition is an unreasonable condition or not. I should, therefore, here take it as a matter of fact, and I certainly find that here there is a real practical mode in which fish are carried upon these ordinary terms in actual use, which consequently I must take to be reasonable terms. There is no practical monopoly pressing upon the parties on account of which they are obliged to act in a particular way. They find it to their advantage in their trade to accept the offer of an alternative, and that offered alternative is not unreasonable.

For these reasons, taking this view, I think that the order appealed against should be reversed, and the judgment of the Divisional Court restored; and of course the costs will be paid by the respondent. I accordingly so move your Lordships.

LORD WATSON.—I so thoroughly agree with the observations which have been made in this case by the noble and learned Lord who has just spoken, that I shall merely say a word or two in addition.

The only doubts that I have felt in this case have arisen from these circumstances. In the first place, the Case which was framed by the County Court Judge was obviously not intended to raise many of the questions which have been discussed at your Lordships' bar. The only point which that learned Judge had in view in delivering judgment, and obviously also in subsequently framing a case as between the parties, was whether any contract between a railway company and a trader which exempted the railway company from the consequences of their own default or negligence—meaning thereby the default or negligence of their servants—would be an illegal contract. The learned Judge in his opinion, to the terms of which I need not particularly advert, plainly drew from the case of *Peek* v. *The North Staffordshire Railway Company* (1) what I consider to be an erroneous inference—namely, that it had been held by the House that such a condition could in no circumstances be inserted in a written contract between the parties without rendering that contract or condition null and void under the statute of 17 & 18 Vict.

Then the other circumstance which to some extent weighed upon my mind, was the fact that the three learned Judges of the Appeal Court were unanimously of opinion, upon quite a different ground, that this was an illegal condition. Shortly stated, the reasons for which I differ from those learned Judges are these. I am satisfied, in point of fact, that the railway company, the appellants, are offering to carry at a reasonable rate with all the liabilities of common carriers; but they also, on condition of being relieved of these liabilities, offer to carry goods of the same class at a lower rate. Now it might be that the alternative rate offered is so much lower as to make the first rate—that is to say, the ordinary rate, for which they propose to carry as common carriers—a perfect illusion, a sham, one that nobody would resort to, and in that sense the lower rate might be represented as a compulsory rate. I cannot at the present moment figure to my own mind such a case, but it might be so. But I can see nothing of that kind here. *Prima facie* I am prepared to hold that a rate sanctioned by the Legislature must be taken to be a reasonable rate. It may be shewn to be, in certain circumstances, unreasonable; but I think the *a priori* presumption is in favour of its reasonableness; and here there is evidence from the mouth of one of the parties, the respondent himself,

(19) Extract from the shorthand notes printed in the Appendix before the House.

to the effect that the rate is, by some traders—dealers in fish—acted upon.

Then, as regards the alternative rate, I am not prepared to adopt, and I cannot adopt, the view which seems to have been taken by the learned Judges of the Appeal Court, that whenever the lower rate without liability on the part of the company is such as to induce the bulk of the traders to prefer it to the ordinary rate with liability on the part of the company, the condition and the lower rate must necessarily be illegal and void. That does not appear to me to be a reasonable construction of the words of the statute, "just and reasonable" condition. It does not appear to me to be warranted by the judgment of this House in *Peek* v. *The North Staffordshire Railway Company* (1). And I take leave here to observe that, according to my apprehension of that case, it authoritatively decides, upon the statute, these three points—in the first place, that a condition of this kind must be in writing in order to bind the trader; in the second place, that it must be proved to the satisfaction of the Court to be a reasonable condition; and, in the third place, that the onus of shewing that it is a reasonable condition rests upon the railway company who allege it.

But the question as to what constitutes a reasonable condition is not a question which Judges can decide, as against their successors, by anticipation; it is a question of fact in each case, depending upon the discretion of the Judge who is dealing with it, and, according to my view, not of law, and must be judged of according to the circumstances in each case. No doubt there are many very valuable suggestions in the case of *Peek* v. *The North Staffordshire Railway Company* (1). But we are not dealing with a case in its circumstances similar to that, according to my apprehension of the facts of it, because there it was held that the company had really proposed to exact a rate so high, not for the honest and *bona fide* purpose of giving an alternative to the trader, but solely with the view of giving no alternative and compelling him to adopt one rate practically in preference to another. I cannot see in the present case the least trace of that compulsion. I cannot find anything in the character of this case to suggest to my mind that the condition is unreasonable. On the contrary, it appears to me to be reasonable; and therefore I have come to the conclusion that I should not be giving effect to the terms of the statute if I did not concur in the proposal to reverse the judgment of the Court below and to return to that of the Queen's Bench Division.

Lord Bramwell.—The case of *Peek* v. *The North Staffordshire Railway Company* (1) was decided twenty years ago. At the time it was decided, and from thence continuously until now, I have always thought it was wrongly decided, and this case confirms me in that opinion; and although it has been in existence for twenty years, and has been acted upon in Courts of law, if it were within my competency to overrule it I would do so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and, having had the benefit of them, they have turned round and have sought to avoid them.

Now I should not like to say that in this case the plaintiff was doing a thing which he ought not to do. In all probability he had not the slightest notion in the world of what were the legal merits of the question that has been argued before us; but it stands confessedly that he has put 20*l.* into his pocket by virtue of the contract which he is now seeking to avoid as an unjust and unreasonable one. However, we are bound by the case that I have mentioned, and consequently we must say whether or not this contract is just and reasonable. Now I will not say that it is impossible that a contract can be unjust and unreasonable where both the parties who have entered into it have fully understood it. I should not like to say that such a thing is an impossibility. Nay, I would go further, and would say that I could very well understand, if, for instance, where a company were entitled to charge 100*l.* for the carriage of a thing, they took off 5*s.* upon the footing of their being

exempted from all responsibility, that peradventure a man who had entered into that contract with them might say, "No, I have discovered that that 5*s*. which you have let me off is not an equivalent, nor anything like an equivalent, for the loss which I sustain by your getting rid of your responsibility." I think such a state of things as that is possible. I will not say it is not. However, putting that as an illustration, without putting further ones, I am not prepared at this moment to say that it is an impossibility that a contract knowingly and voluntarily entered into by two parties could be unjust and unreasonable. If it is not voluntarily entered into, that is a very different thing. But, for my own part, I am prepared to hold that unless some evidence is given to shew that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and a reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are *prima facie* proved against him by his being a party to it; and if he means to say that it is unjust and unreasonable, he must shew that it is so. I am prepared to hold that; and, in this particular case, that it is just and reasonable is, to my mind, beyond the slightest doubt, looking at the profit which the plaintiff has made by it. And when it is said, "Why, what an unreasonable thing it is that you should exempt yourselves" (as I own I think this agreement does) "from all responsibility, even for the wilful default or wilful act of your own servants," I deny that there is anything necessarily unreasonable in it. I say that any man who wants to make out that it is unreasonable must prove it. I can perfectly understand (as I put in the course of the argument) a man going to a railway company and saying, "Now I deal with you; you carry fish for me; we often fall out, we have disputes; sometimes the fish is late, sometimes it is injured; sometimes it is your fault, sometimes it is not; we get into trouble and into litigation with each other; if you will make me an abatement of five per cent.," or ten per cent., or twenty per cent., or whatever he thinks fit to ask and they to agree to, "I will undertake to hold you not responsible even if the fish is spoilt or stolen by your own servants." I can understand that to be a perfectly reasonable proposal for him to make and for the company to accept; and it seems to me perfectly idle—and I cannot understand how it could have been supposed necessary that it should be referred to a Judge—to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not. However, so it is, and I repeat that I am, for my own part, prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should require the strongest possible evidence, or something more even than a possibility, to shew me that that was an unreasonable agreement.

Now, in my opinion, this was a voluntary agreement. That is the question which we have to consider, and the fact that there was an alternative is only of importance as shewing that the agreement was voluntary; because, if there is no alternative, then although the agreement is come to in terms, yet in truth in a sense it is no agreement between the parties because there is a compulsion on one of them to enter into it. Therefore it becomes of importance to see whether there was an alternative, for the purpose of seeing whether the agreement was a voluntary one. Now there was most obviously an alternative. Where was this alternative? The plaintiff might have sent his fish if he had liked paying twenty-five per cent. more than he did—that is to say, paying 100*l*. where he paid 80*l*. If he had liked he might have sent his fish paying in that ratio and in that proportion; or he might have sent it upon the terms upon which he did send it—and he chose the latter.

Really it is difficult for me to express the opinion which I entertain upon this question with a sufficient apparent respect for the opinion of those who have thought differently — namely, the learned Judges

in the Court below. They seem to say that there is no option because the terms are too good — the benefit given to the plaintiff is too great; that if a less benefit were given to him and to all the other senders of fish—if instead of twenty per cent. being taken off the price, it were ten, or peradventure five (for ten might be too much, for aught I know)—then, indeed, there would be an option; but as it is, it is such an irresistible temptation to him I suppose, it is so good a thing for him, that he has no choice but to take it. Well, one has heard a great many discussions about free will, but I protest that this is a novelty—I never heard anything like it before—it is the most extraordinary proposition that I ever heard in my life. The assumption that he is obliged to do it because he cannot otherwise compete with his fellow fishmongers, is the most gratuitous one that was ever invented in this world. He says that he has put 20*l.* into his pocket; but suppose that his profit was twenty times 20*l.*, or two hundred times 20*l.*, in the course of the year, which, for aught we know, it might be—there is not the slightest proof that it is not so—it is said that because he has put 20*l.* into his pocket we are to infer that he could not carry on his trade unless he could put that 20*l.* into his pocket, and therefore that the thing is of a compulsory nature, and that he has no option, no choice, and that consequently his agreement is not voluntary. I repeat that I really do not understand how such a conclusion could have been come to, except by some generous feeling that railway companies ought to be kept in order for the benefit of fishmongers.

Now just let me ask this question—"Just and reasonable"—Is it just? If it is not, it is unjust. Is it unjust? Will any human being say that this man has been unjustly treated? Well, but justice alone is not sufficient; you must not only be just, but you must be reasonable—which, by the way, rather imports that you may be one without the other. I should think that that was an extremely difficult thing to say. However, if it is just, is it reasonable? Why its very justice shews its reasonableness.

I must say that I really do think this is about the plainest case that ever came before your Lordships' House.

LORD FITZGERALD.—I concur. The question for our consideration is, whether the conditions expressed in the special contract signed by the plaintiff are just and reasonable. Such a question always involves matters of fact as well as legal considerations, and probably was made a question for judicial decision in order to afford some protection to parties dealing with carriers and public companies against injustice and oppression, and insure for them freedom of contract. The true construction of the special contract has been raised before us, and I think that its conditions must be read according to the ordinary and natural meaning of the language used, and that your Lordships would not be justified in importing or implying any limitation not expressed. Read in that light the language is large enough to protect the defendants from the negligent conduct of their servants, but I am not inclined to go further. If your Lordships were to interpret it as protecting the defendants from wilful misconduct or their own wrongful acts, then a large and important question would arise for determination—namely, whether a contract which wholly relieved the company from liability for loss or damage, and exonerated them from all the obligations of duty, was not in itself unjust and unreasonable and contrary to the policy of the law.

Assuming, then, that the special contract if it stood alone and without more might have been unreasonable, it may become fair and reasonable if a proper alternative was offered to the plaintiff. The alternative, in my judgment, was a fair and reasonable one. It was to carry at a rate, which we must deem to have been reasonable, as it was less than the Parliamentary rate, and subject to all the liabilities of carriers at common law. The defendants at the same time offered to carry at a reduction of twenty per cent. if relieved from certain common law liabilities.

The plaintiff deliberately rejected the first and accepted the second—and signed a contract to that effect. He now asks to be relieved from it, alleging that it was unjust as imposing on him unreasonable conditions, and that in effect he was coerced

to adopt it, having no option. The Court of Appeal seems to have been of that opinion, and two of the Lords Justices seem to rest their decision on the ground that the plaintiff was not a free agent.

Thus Lord Justice Baggallay, after giving his impression on what I cannot help thinking was the main question, is represented to have said: "But I do not think it necessary to express a definite opinion upon that point now; because it appears to me that, having regard to the circumstances of this case, there really was no option as between the two modes of carriage which the plaintiff could adopt. I think, therefore, that this appeal must be allowed." And Lord Justice Lindley thus expresses his final opinion: "It follows from the foregoing reasoning that, in my opinion, such a contract as the one before us might be reasonable under other circumstances; and I cannot go to the length of my brothers Baggallay and Brett and say that such a contract must be unreasonable in all cases. I should consider it reasonable in all cases in which the customer was not practically compelled to adopt the lower rate. Under such circumstances I should concur with Lords Blackburn and Bramwell, and with the decision in *Simons* v. *The Great Western Railway Company* (2)."

In that view I am unable to follow the Lords Justices, but, though differing from them with hesitation, I prefer the opinion of Mr. Justice Mathew in the Divisional Court, when he says: "It is perfectly clear here that the customer was free if he chose to have gone to the company and demanded that they should have carried his goods as common carriers. In that state of things they would be liable in the ordinary way for all the risks of the carriage. But the company, in lieu of that contract which rendered them liable for all the risks of the journey, proposed to the customer the terms which I have just read, and in consideration of his accepting those terms they proposed to carry his goods at one-fifth less than the ordinary rate; and the customer agrees to those terms." Why should the plaintiff be relieved from the contract he has deliberately accepted? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate—the alternative offered to him was fair; and I can discover no ground on which we can treat this special contract as a fraud on the statute, or relieve the plaintiff from its consequences.

Order under appeal reversed. Order of the Queen's Bench Division restored. The respondent to repay (according to the undertaking given) the costs in the Court below, and to pay the costs of this appeal.

Solicitors — Cunliffe, Beaumont & Davenport, agents for R. Lingard-Monk, Manchester, for appellants; Rollit & Sons, agents for Rollit & Sons, Hull, for respondents.

[IN THE COURT OF APPEAL.]

1883. Dec. 17, 18. } BURTON AND COMPANY *v.* ENGLISH AND COMPANY.*

Ship—Charter-party—Carriage of Deck Cargo at Merchant's Risk—Loss by Jettison—General Average Contribution.

The plaintiffs, as charterers of a vessel of which the defendants were owners, shipped a deck cargo of timber under a charter-party which contained a stipulation that "the vessel should be provided with a deck cargo, if required, at full freight, but at merchant's risk." During the voyage a portion of the deck cargo was necessarily and properly jettisoned in order to save the ship and the rest of the cargo:—Held, *that the stipulation did not exclude the right of the charterers to recover general average from the shipowners for the loss sustained: for the jettison was effected by the master, acting in the interest of all concerned, and not as servant of the shipowners.*

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 386) *reversed.*

Appeal from a judgment of the Queen's Bench Division on a Special Case reported 52 Law J. Rep. Q.B. 386.

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

Burton v. *English*, *App.*

The plaintiffs chartered one of the defendants' ships to load a cargo of timber under a charter-party which contained the following stipulation *inter alia*: "the steamer to be provided with a deck load if required at full freight, but at merchant's risk." The plaintiffs shipped a cargo of timber, part under deck and part on deck, in respect of which the master of the ship signed a bill of lading which incorporated the charter-party. The remainder of the cargo consisted of iron shipped by the master in pursuance of a stipulation in the margin of the charter-party. It was proved that it was the custom for ships carrying timber cargoes upon voyages from Finklippan, the port of loading, and from other Baltic ports in the neighbourhood, to English ports and ports on the continent of Europe, to carry a deck cargo of timber on such voyages, and that the custom existed at the time when the charter-party was effected and until the arrival of the ship in London. During the voyage, part of the deck cargo was jettisoned, and it was admitted that the cargo was necessarily and properly jettisoned in order to save the ship and the rest of the cargo.

The Queen's Bench Division (Cave, J., and Day, J.) were of opinion that the stipulation "at merchant's risk" excluded any right on the part of the plaintiffs to recover from the defendants a general average contribution in respect of so much of the deck cargo as had been jettisoned.

The plaintiffs appealed.

Cohen, *Q.C.*, and *Gorell Barnes*, for the plaintiffs.—It is admitted that if there is no custom to carry goods on the deck, but merely an agreement between the shipowner and the owner of the goods that they should be so carried, then the plaintiffs are not entitled to recover a general average contribution for the loss of the timber jettisoned—*Wright* v. *Marwood* (1). But here the custom was proved. The words "at merchant's risk" were not intended to relieve the defendants of all liability, but merely of liability as carriers under the contract of carriage, and they have reference to losses which might be occasioned by fire, collision, negligence of the master and crew, and the like. A shipowner is liable to a general average contribution for injury done to goods by water poured into the hold to extinguish a fire—*The Whitecross Wire and Iron Company* v. *Savill* (2). Where similar words were used in a bill of lading, it has been held that they have no application to a general average contribution—*Schmidt* v. *The Royal Mail Steamship Company* (3) and *Crookes* v. *Allen* (4). The object of the stipulation was this—that inasmuch as deck cargoes are liable to be unduly jettisoned, there is to be no freight payable unless they are carried to the place of destination. *Prima facie*, the object of the charter-party and bill of lading is to define the contract of carriage, and if the shipowner intends to relieve himself from the ordinary liability to general average he must do so in clear terms. *Macauley* v. *The Furness Railway Company* (5) and *Johnson* v. *Macdonald* (6) were also referred to.

Myburgh, *Q.C.*, and *C. Tyser* (with them *R. E. Webster*, *Q.C.*), for the defendants.—This stipulation has no reference at all to the liability of the defendants as carriers. It is also found in the Special Case that before the charter-party was entered into there was a custom in the Baltic ports for ships to carry deck cargoes. The stipulation applies, not to any liability under the contract of carriage, but to the liability for loss of deck cargo only. If any loss occurred by the negligence of the master and crew, collision and the like, it would not be covered by this clause. *Crookes* v. *Allen* (4) merely gives a rule of interpretation.

BRETT, M.R.—In this case, the plaintiffs, who are timber merchants, shipped a cargo of timber, part on deck and part in the hold, and also a cargo of iron,

(1) 50 Law J. Rep. Q.B. 643; Law Rep. 7 Q.B. D. 62.

(2) 51 Law J. Rep. Q.B. 426; Law Rep. 8 Q.B. D. 653.

(3) 45 Law J. Rep. Q.B. 646.

(4) 49 Law J. Rep. Q.B. 201; Law Rep. 5 Q.B. D. 38.

(5) 42 Law J. Rep. Q.B. 4; Law Rep, 8 Q.B 57.

(6) 9 Mee. & W. 600; 12 Law J. Rep. Exch 99.

under two contracts. The ship was taken up by the plaintiffs under the charter-party; but the goods were put on board under a bill of lading which referred to and incorporated the charter-party: so that the ordinary contract of carriage is limited by the terms of that document and the bill of lading. During the voyage and in a case of necessity part of the deck cargo was jettisoned for the safety of both the ship and the remainder of cargo, and thereupon the plaintiffs seek to recover a general average contribution from the defendants, the shipowners, for the loss of that part of the deck cargo by jettison. On the part of the defendants it was said that the stipulation contained in the charter-party absolved them from liability. But, in the first place, it is to be noticed that the ship was not a general ship, but was taken up by the charterers for the purpose of carrying two or three different cargoes. It is obvious that the stipulation which is supposed to absolve the shipowners from liability is a stipulation in their favour, and the deck cargo is to be provided if required in order that they may earn a larger freight, but it is to be at the merchant's risk. It was held by the Court below that the words "at merchant's risk" absolved the shipowners from liability to contribute to a general average sacrifice of part of the deck cargo; and what had weighed most with the Court was this—that if the deck cargo had been properly and necessarily jettisoned, the shipowners would be liable to general average contribution; but that if it had been unnecessarily or improperly jettisoned, the shipowners, who would otherwise have been liable, would be relieved by the words of the stipulation. The stipulation undoubtedly is a limitation of the liability of the shipowners in respect of the contract of carriage. The general rule of construction where there is any reasonable doubt, is to construe such a stipulation against the person in whose favour it has been made, so as to limit its operation. That drives us to consider by what right it is that the owners of this deck cargo are now claiming a general average contribution. If the liability of the shipowners arose in consequence of the acts of their servants, it would follow that, the words of the stipulation being large enough to cover every liability so arising, they would be free from liability.

I have not forgotten that there is a custom at the port where these goods were shipped to carry deck cargoes; but that does not interfere with the view I have taken of this matter. The stipulation is intended to, or at all events does, cover every act of the master which, if done as a servant of the shipowners, would have made them liable but for this stipulation. It does, therefore, cover the case of improper conduct on the part of the master and crew, such as an improper jettison, or a loss of timber by reason of stranding of the ship which has been brought about by improper conduct. But does it cover the present claim? This claim does not arise from any act of the master as servant of the shipowners; if it did, it would be a claim, not for contribution, but for the whole value of the loss. The claim arises in respect of an act done by the master as agent of the cargo owners; the theory being that a voluntary sacrifice of part of the cargo is made by the cargo owners, and that the captain consents, on behalf of the shipowners, that the cargo owners shall throw overboard the cargo. The act of the master in jettisoning the cargo is therefore the act of the cargo owners, and not of the shipowners at all. By what law, then, does the cargo owner claim contribution? In *Wright* v. *Marwood* (1) it was suggested by Lord Justice Bramwell that the claim would seem to arise out of an implied contract. I cannot think that it is part of the contract of carriage. It certainly does not exist as part of the contract of carriage by land, for there is no general average contribution in respect of such a contract. It only exists in respect to adventures at sea. I do not think that it arises out of contract at all. It arose out of the Rhodian law; and in consequence of the peculiar nature of the undertaking it has been agreed that, where persons are in joint danger, which may be avoided by a voluntary sacrifice made by one of them, natural justice requires that the others should contribute to the sacrifice so made. It is therefore part of the maritime law which has been incorporated into the municipal law of England. That being so, and as it

is not within the contract, it seems to me that it is not covered by the stipulation. I therefore venture to differ from the natural interpretation put upon those words by the Court below, and I also think the difficulty which was there suggested does not really arise. The act of the master was not done in the capacity of servant to the shipowners, but as agent of the cargo owners, and the authority to so act was given by necessity. The case is by no means free from difficulty. I think that the liability of the defendants is not covered by the stipulation. The appeal must therefore be allowed.

BAGGALLAY, L.J.—I am of the same opinion. I do not understand that Mr. Justice Cave, in delivering judgment, at all dissented from the law as enunciated by Mr. Justice Lush in *Schmidt* v. *The Royal Mail Steamship Company* (3) and *Crookes* v. *Allen* (4); but, adopting the principles there laid down, he proceeded to consider whether there was any difference in the circumstances of the present case. I, however, draw a different inference with regard to the circumstances to that which Mr. Justice Cave drew. Agreeing with the principles as stated, I differ as regards the mode in which they are to be applied in the present case.

BOWEN, L.J.—The first matter we have to discuss is, whether there are any rules of construction which can be brought to bear upon the construction of this document. We are assisted in this by the remarks of Mr. Justice Lush in *Crookes* v. *Allen* (4), following the view adopted in *Schmidt* v. *The Royal Mail Steamship Company* (3), in which he said, "The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average."

The first observation to be made on that proposition is, that it is not, strictly speaking, a rule of law; for a universal rule of law for the interpretation of a charter-party and bill of lading cannot be laid down. But it is a practical observation brought to bear upon the construction of a mercantile document in ordinary use from the experience of those who are conversant with the matter. In the second place, one must see whether the provision has been introduced by way of exception, or in favour of one of the parties as contradistinguished from the other; for those who wish to introduce a stipulation for their own benefit or to shield themselves from liability must do so by clear words. With these two observations I come to the document in question. The stipulation, which is in print, is clearly in favour of the shipowners, and is *prima facie* intended to relieve them from some acts of their servants for which they would otherwise have been liable. Under the contract of carriage the stipulation would cover the negligence of the master and crew—as, for instance, where the vessel was stranded by their negligence—and other acts of the servants of the shipowners, for which they would otherwise have been liable but for that stipulation. But does it cover this claim? The present claim certainly arose from the consequences of an act done by the master acting as agent, not for the shipowners alone, but, amongst others, for the cargo owners, by which he jettisoned the cargo upon the implied terms that the principal shall be indemnified for the loss thus occasioned as upon a general average basis. I do not think that this was a class of risk which the stipulation was intended to cover; but the point is not at all clear. The contract is to carry goods from a Baltic port where there is a custom to load a deck cargo, and I find it difficult not to think that those who drew this contract were thinking of deck loads and of risk by jettison. The sound principle to be applied is, that those who make exceptions in their own favour, and to relieve themselves from liability, ought to use clear words. If, therefore, shipowners desire to relieve themselves from liability for jettison, they should do so in clear terms. My judgment proceeds on the basis that the words of this stipulation are not clear enough.

Appeal allowed.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; H. C. Coote, agent for H. A. Adamson, North Shields, for defendants.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. Dec. 11, 12. 1884. Jan. 22, 23, 24. } JACQUES *v.* HARRISON.*

Practice—Action for Recovery of Land—Right of Equitable Mortgagee of Defendant, not being a Party to the Action, to intervene—Application by him to set aside Judgment signed against Defendant by default—Notice of such Application to Defendant—Mode of Proceeding—Rules of Court, 1883—*Order XXVII. rules* 7 *and* 15.

A stranger to an action, who is injuriously affected by a judgment signed by default against the defendant to the action, may obtain the defendant's leave to use his name, and can then apply in that name to set the judgment aside; or he may take out a summons in his own name asking to have the judgment set aside, and serve the summons on both the plaintiff and the defendant, but he cannot apply to set the judgment so signed aside without making both the plaintiff and the defendant parties to the application.

Judgment was signed by default against a defendant in an action for recovery of land. The equitable mortgagee of the defendant, being the person really interested in the land, applied by a summons, which was not served on the defendant, to set this judgment aside:—

Held, *that the judgment ought to be set aside on terms, and that the equitable mortgagee ought to be allowed to defend in the name of the defendant; but that this could not be done without notice to the defendant.*

Appeal from the refusal by Field, J., at chambers, to set aside a judgment obtained by the plaintiff and to stay proceedings thereon in an action of ejectment for forfeiture of a lease by reason of a breach of covenant to repair the hereditaments thereby demised. There were eight other similar leases, upon each of which action had been brought and carried through up to judgment, but the formal appeal was only as to one. The lessor sold the property, subject to these nine leases, to the Freehold Building Society, who assigned the ground rents to the plaintiff. The Building Society also made advances to the defendant on the security of the leases, and, by reason of the defendant's failure to repay the same, his interest therein had ceased, of which fact the plaintiff was aware before action. The defendant suffered judgment to go by default, and the official liquidator of the Freehold Building Society now sought to set the judgment aside on the ground that they, as equitable mortgagees, ought to have had notice of the actions, in which case they would have been able to get them restrained unless the plaintiff made them also defendants.

Wills, Q.C. (with him *E. Beaumont*), for the official liquidator of the Freehold Building Society.—Under Order XXVII. rule 15 (1), the Court has power to set aside a judgment upon such terms as to costs or otherwise as the Court or a Judge may direct, and this is a case for the exercise of that discretionary power. Before the Judicature Acts, the Court would have allowed the society, though strangers to the estate, to be made parties—*Thrustout dem. Jones* v. *Shenton* (2), *Hutchinson* v. *Greenwood* (3) and *Doe d. Martin* v. *Grey* (4).

If the society had been made defendants, as it is submitted they ought, the defence that there had been no sufficient notice under the Conveyancing Act, 1881 (5),

* *Coram* Grove J.; Huddleston, B., and Hawkins, J.; and in the Court of Appeal, *Coram* Brett, M.R., and Bowen, L.J.

(1) Rules of Court, 1883, Order XXVII rule 7: "In an action for the recovery of land, if the defendant makes default, as mentioned in rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs."

Rule 15: "Any judgment by default, whether under this Order or under any other of these rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit."

(2) 10 B. & C. 110.

(3) 4 E. & B. 324; 24 Law J. Rep. Q.B. 2.

(4) 10 B. & C. 615.

(5) 44 & 45 Vict. c. 41. s. 14: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor

Jacques v. *Harrison, App.*

would have been available to them, and, in fact, on application made to him, Bacon, V.C., held that judgment had been improperly signed, as there had been no such notice given, but that he had no power to set aside a judgment of this division of the High Court.

The society have the broad interest—that is, the true property—in these hereditaments, and the Court has the power to give relief—*Wright* v. *Redgrave* (6), *per* James, L.J.: "To make it quite certain that no harm could be done by the abolition of injunctions, sub-section 7 (of the 24th section of the Judicature Act, 1873) gives to every division of the High Court power to give all such remedies as any parties may be entitled to in respect of every legal or equitable claim properly brought before the Court." Though there has been perhaps some little delay, it is not material—*Atwood* v. *Chichester* (7).

Crump, for the plaintiff.—The Freehold Land Society have no *locus standi*. They are not parties to the proceedings at all, and it was their own fault that they are not, as they knew on the 10th of September, 1883, of the defendant's breaches of contract, and on the 6th of October, 1883, that the writs were out. In effect they had a sufficient notice under the Act. The correspondence between the plaintiff and the society's agent constitutes a good notice. They might have performed the covenants and prevented the actions being brought. If the notice was bad, that would constitute a defence in the action; but the applicants are too late now. They knew of the action and should have applied to be made defendants. They chose to stand by, and it is now too late. At any rate, the order, if made, can only be on the terms of payment of the costs.

The applicants' proper course would have been that laid down in the Conveyancing Act. A judgment can only be set aside for irregularity, and then only on an affidavit of merits. That affidavit the applicants cannot make. The Court can only stay proceedings under the Act of 1873, s. 24, sub-s. 5, in a cause or matter pending, which this is not.

GROVE, J.—This is an application in one of nine actions brought in ejectment for forfeiture of certain leases by reason of the non-repair of the hereditaments demised. These leases were mortgaged to a company, of which the present applicant is the official liquidator, by the defendant, the lessee, who, it is admitted in a letter of the plaintiff to the former solicitor of the company, had no further interest in the leases. On or about the 7th of September, 1883, there were threats of legal proceedings contained in letters to the same solicitor; but there is no evidence that these threats came to the knowledge of the company, who had changed their solicitors. On the 27th of September nine writs were served on the defendant Harrison, and there is no evidence that the official liquidator became aware of their issue before the 6th of October, 1883. It is admitted that the liquidator did not take immediate advantage of the knowledge when he learnt, on the 6th of October, that the writs had been issued; and when, on the 10th, he took steps in the matter, he found that judgments had been signed in the nine actions. I think that the plaintiff knew very well that the defendant would not be likely to defend these actions, having no further interest in the leases, and it is not necessary to say that there was collusion between the plaintiff and defendant. Still it might well be that there was; and in many cases judgment is undoubtedly signed through collusive action on the part of the immediate parties, to the prejudice of the rights of third persons. An application was made to Vice-Chancellor Bacon under the Conveyancing Act, 1881, and he held that judgment had been improperly obtained, there having been no sufficient notice before action under that Act; but that the matter being in the Queen's Bench Division, he had no power to set aside the

serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

(6) Law Rep. 11 Ch. D. 32.

(7) Law Rep. 3 Q.B. D. 722.

judgment. Though, of course, not bound by this decision, we must take it as correct, and we have his opinion that these actions were really capable of a valid defence, if the company had been let in to defend, and that judgment was wrongly entered by default. In my judgment, Order XXVII. rule 15, gives us authority to set aside the judgment, although the applicant be not a party to the cause, and this case shews that it is a very useful authority. Under all the circumstances, the Court should, I think, set this judgment aside. The question then remains as to the terms upon which it is to be set aside. It does not appear to me to have been necessary to bring nine actions against the defendant, who it was known would not defend; and it is remarkable that no notice was given to the society, who, having an equitable interest, could, as the cases shew, have been joined as parties, and are not, as it was contended, absolutely outside. I therefore think the costs should not be cast on the applicants, but should be reserved until the other actions are brought before the Court.

HUDDLESTON, B.—I am clearly of opinion that we ought to set aside this judgment, if we have the power; and I think, without doubt, we have the power under Order XXVII. rule 15. I also think that the costs should be reserved in this case to be dealt with when the rest of the actions are before us.

HAWKINS, J., concurred.

The plaintiff appealed.

W. Phipson Beale and *J. E. Bankes*, for the plaintiff.—The judgment was regular, and ought not to be set aside. The official liquidator, while the action was proceeding, might have applied for a stay of proceedings under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14 (5); but, having failed to do so, he is not entitled to have the judgment set aside. No person is empowered under the Judicature Acts or Rules of Court to intervene during the progress of the suit, except where he is in possession of the land either by himself or by his tenant, and then only by leave to be obtained on filing an affidavit stating those facts—Order XII. rule 25. The equitable mortgagees have no *locus standi*, inasmuch as they do not appear to be in possession of the land. Judicature Act, 1873, s. 24, and Order XXVII. rule 15 (1), were referred to.

Wills, Q.C., and *E. Beaumont*, for the official liquidator.—The Court has jurisdiction to interfere and stay proceedings on behalf of persons who may be affected by the proceedings—that is, persons to whom the judgment may be an impediment. A person affected by an order of a Master may appeal therefrom—Order LIV. rule 21. The judgment here is registered, and is a blot upon the title. The decree of the Vice-Chancellor does not get rid of that blot.

Cur. adv. vult.

The judgment of the Court was (on Jan. 24) delivered by

BOWEN, L.J.—In this case (and I hope and believe in many others) the Court is fortunately able to cure the slips and errors that have been made in practice upon terms which will prevent the possibility of injustice, and to place the parties in the position in which they would have, and ought to have, stood but for technical mistakes.

The plaintiff has sued the defendant in an action for recovery of certain lands and premises, based upon forfeitures arising out of the defendant's breach of the covenants of his lease. The person really interested in the premises is not the defendant, but the official liquidator of a building society which was the equitable mortgagee of the defendant; and that society, not being in possession, was not made a party to the action. The defendant accordingly, having no interest in the litigation, allowed judgment to go against himself by default, and a writ of possession issued, under which the plaintiff has taken possession of the premises claimed. It appears, however, that if the defendant had chosen to defend, or if the respondent, the official liquidator, who represents his equitable mortgagee, had intervened betimes and taken on himself to defend, the plaintiff, who appears not to have served on the defendant the notice required by the Conveyancing Act, 1881, would in all probability have had no right to recover. Owing to a few days' delay, the respondent,

who represents the equitable mortgagee, unfortunately failed to intervene till judgment had been actually signed against the defendant and possession given. He is, however, interested in the matter, and is affected by the judgment, which, so long as it stands, is a blot upon the title of the mortgagee; and it cannot be doubted, on the materials at present before us, that he would be entitled, even at this late stage, to have the judgment set aside, and have liberty, on reasonable terms, to defend the action, provided he had taken the proper steps, or even if any technical omission of which he has been guilty can now be cured.

The power of the Court to rectify *bona fide* slips does not, however, as it appears to us, dispense with the necessity of pointing out what was, in such circumstances, the proper practice to be followed, especially as it is one that, in our opinion, is based, not on any mere formal rule, but on the strict requirements of justice.

There are, so far as we can see, only two modes open by which any stranger to an action who is injuriously affected by the judgment suffered by a defendant by default can set that judgment aside; and these two modes are amply sufficient to protect any such stranger in all cases in all his rights.

He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the Judge may think reasonable and just.

Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers, to be served on both the defendant and the plaintiff, asking leave to have the judgment set aside, or to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the Judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5.

By one or other of these two modes, all that justice requires in any case can be done. But it is of the essence of the intervention of the third person, if he adopts the latter course, that the defendant should be made a party to the application. This is not a mere form, but an essential requirement of justice. The defendant has thought it more consistent with his own interest to submit at once to the plaintiff's claim instead of contesting it further. If, at the instance of a stranger to an action, litigation is sought to be revived, the defendant has a right in the first place to dispute the title of the applicant to interfere. He has no opportunity of doing so unless he is made a party to the summons. In the second place he has a right to be heard upon the question whether, if litigation is to be prolonged against himself *in invitum* which he desired to have closed by his submission, he should not be indemnified against any risks or costs to which he may be otherwise exposed by its prolongation. Until the applicant has made the defendant a party to the application by service upon him of the summons, the applicant remains a mere stranger to the action.

The plaintiff, moreover, is interested in seeing that what the applicant proposes to do should be done in a way which binds the defendant whom he is suing. In what position would the plaintiff otherwise be placed? The judgment against the defendant having been set aside by a mere stranger, that stranger might, unless made a party to the action, content himself by retiring once more into the background. What could the plaintiff do? Sign judgment against the defendant again, unless the stranger took the opportunity of the interval to intervene in the action in proper form? If so, from whom could he recover the added costs? On the other hand, he could not proceed with the action without an antagonist to fight with and one who would be responsible for costs in the case of failure. The plaintiff is on his side, therefore, interested in seeing that what is done shall be done upon terms which give him a substantial antagonist, by whose revived defence of the action the defendant shall be bound, and to whom the plaintiff may look for his costs. Otherwise he is called upon to fight against a shadow. But these terms cannot be settled

unless the defendant is made a party to the application.

Unfortunately the present respondent did not pursue either of these necessary courses. He took out, as he had a right to do, a summons in his own name against the plaintiff asking to set aside the judgment, but he did not make the defendant a party. He was, no doubt, misled into this irregularity by the conduct of the defendant, who, in a previous proceeding before Vice-Chancellor Bacon, had intimated that he did not intend troubling himself further in the matter. But the defendant's language in a Chancery action did not dispense with the necessity of making him a party to any application made in an action in the Queen's Bench Division in which he was the defendant on the record. He had a right to change his mind. He had a right, moreover, to be heard as to being indemnified in his own action. On the hearing of the summons, to which he was not a party, Mr. Justice Field might no doubt have adjourned the summons for his attendance, or adopted some means of protecting him in his absence. It does not appear that he was asked to do so; and as the respondent could only obtain a *locus standi* by means of service on the defendant, or notice to him of this application; and as such service or notice on the very face of the summons had not been given, Mr. Justice Field, in conformity with the practice and with law, dismissed the summons on the ground that the respondent was a mere stranger as yet to the action.

The respondent appealed against this decision without curing the blot manifest on the very face of the application. The Divisional Court decided in his favour, reversing the judgment of Mr. Justice Field, on the ground that Order XXVII. rule 15 (1) gave the applicant a *locus standi*. Strictly speaking, we should have been disposed to think this decision incorrect as a matter of practice, and a misconception of the effect of the rule, which was not designed to give a *locus standi* to persons who had none, but to enable judgments by default to be set aside on terms by those who had or could acquire a *locus standi*. Probably no substantial injustice was done: the defendant did, in all probability, not care to interfere. But this is surmise only, and, as a matter of practice, it is difficult, in technical strictness, to justify an order made at the instance of a stranger claiming to be interested in an action that affects the possible rights of the defendant on the record, who has not been made a party to the application, and whose rights are not protected by the order.

Then an appeal is brought to this Court. The blot in the proceedings of the respondent still remains uncured. It would be a grave pity if all these proceedings were to be rendered abortive for the sake of protecting the property of a person who may not, after all, care to be protected. It seems to us that the proper course to pursue is, while recognising the error in practice that has occurred, to mould the order of the Queen's Bench Division in such a way as will prevent the possibility of injustice, and preserve to the defendant an opportunity, even now, of being heard if he desires to claim it. In our opinion, accordingly, the following is the order which the Court of Appeal should now make:—

Judgments by default and writs of possession to be set aside on payment of costs hereinafter mentioned, and respondent to be at liberty to defend the action in the defendant's name: the respondent undertaking to submit to any order the Court may make for the defendant's indemnification. Notice to be served forthwith by the respondent on the defendant, who is to be at liberty to apply to vary or discharge this order.

It remains to be considered as to the terms to be imposed upon the respondent as to costs already incurred or thrown away. The issue of nine writs by the applicant instead of one appears to have been wholly unjustifiable. The judgments and writs of possession must be set aside on the payment by the respondent of the costs of one judgment and one writ of possession. The question of the costs of this appeal and of the proceedings below is more difficult. The respondent has been technically wrong throughout. On the other hand, the appellant has availed himself of a blot in the respondent's proceedings, not for the purpose of getting it cured in the proper way, but for the purpose of insisting on terms which were

exaggerated, and which he never could have obtained. The nearest approach to justice is to make the costs of this appeal and of the proceedings below fall upon the appellant. Other costs, if any, to be reserved. Liberty to all parties to apply.

Order accordingly.

Solicitors—Trollope & Winckworth, for plaintiff; Learoyd & Learoyd, for the official liquidator.

1884. Jan. 24. } CREDITO GERUNDEUSE (LIMITED) *v.* VAN WEEDE.

Practice—Interpleader—Service of Summons out of Jurisdiction—Order LVII.

The Court has power to grant leave to issue an interpleader summons to be served on a foreigner resident out of the jurisdiction; and though such summons, if disobeyed, cannot be actively enforced, the Court can bar the claim of the foreigner refusing to submit himself to the jurisdiction.

This was a motion for leave to issue and serve an interpleader summons out of the jurisdiction. The plaintiffs brought an action against the defendant, as bailee and London agent of Don Pedro Jordi, of Pala Furgell in Spain, to recover 320 bales of cork, assigned by Jordi to the plaintiffs. The defendant, in his affidavit, said that he had in his hands certain corks consigned to him by Jordi, which were part of the corks claimed by the plaintiffs under an alleged assignment by Jordi to them; but that he had taken counsel's opinion, and that it appeared that the assignment was bad by the Spanish law. The defendant therefore sought to let Jordi and the plaintiffs interplead. A summons taken out for leave to issue an interpleader summons to be served on Jordi out of the jurisdiction was referred by Mathew, J., to the Divisional Court.

Gorell Barnes, for the motion.—The learned Judge would not make the order, as he said he did not see how it could be enforced. Although such an order could not be actively enforced, yet the Chancery practice was to exclude the foreigner from ever bringing his claim into Court if he did not obey the summons—*Daniell's Chancery Practice* (1). This can be done by barring the foreigner's claim. There is a *dictum* of Alderson, B., against this contention in *Patorni* v. *Campbell* (2), but it is *obiter*. The fact of the claim being made by Jordi is evidence of a submission to the jurisdiction. There is nothing in the new rules as to interpleader practice to exclude service of a summons out of the jurisdiction. *Benazech* v. *Bassett* (3), *Webster* v. *Delafield* (4), *Attenborough* v. *The London and St. Katharine Docks Company* (5), *Belmonte and others* v. *Aynard* (6), *Story*, sections 800–824, and the Judicature Act, 1873, s. 24, were also referred to.

Pollock, B.—This was an application on behalf of Van Weede, who is defendant in an action at the suit of the Credito Gerundeuse (Limited), for leave to serve a copy of an interpleader summons upon one Don Pedro Jordi, a Spanish subject, now at Gerona in Spain.

The plaintiffs, in their statement of claim, allege that the defendant, as the bailee and London agent for the sale of 320 bales of cork, the property of Don Pedro Jordi, of Pala Furgell in Spain, sold and transferred the property in them to the plaintiffs, of which sale due notice was given by him and by the plaintiffs to the defendant; that the plaintiffs demanded the said goods from the defendant, and that the defendant refused to deliver them to the plaintiffs or their agent.

The application was supported by the affidavit of the defendant, which stated that there were in his hands certain corks, being a portion of the consignments sent to him by Jordi; and that in July, 1883, he received a letter from Messrs. Aynard & Ruffer, of Lombard Street, who claimed the corks, the subject-matter of the action, on behalf of the plaintiffs, under an assignment purporting to have been made by the said Jordi to the plaintiffs; and

(1) 5th ed. vol. i. p. 137.
(2) 12 M. & W. 277.
(3) 1 Com. B. Rep. 313.
(4) 7 Com. B. Rep. 187; 18 Law J. Rep. C.P. 186.
(5) 47 Law J. Rep. C.P. 763; Law Rep. 3 C.P. D. 373 and 450.
(6) Law Rep. 4 C.P. D. 221, 352.

that, after becoming acquainted with the facts, and having taken counsel's opinion as to the validity of such assignment, it appeared that it was void according to Spanish law.

The defendant further alleged that he claimed no interest in the goods in question, and that he did not collude with the plaintiffs or with Jordi, and that the right to the said goods and their value was claimed by Jordi, who would probably sue for the same.

Mr. Justice Mathew, sitting at chambers, declined to make the order asked for, upon the ground that Jordi, being a foreign subject and resident abroad, this Court would have no authority to enforce any order which might be made against him. The matter does not appear to have been fully argued at chambers, nor was the attention of the learned Judge called to the authorities.

Had Jordi actually commenced an action in this Court against the defendant, claiming the goods or their value, it would seem clear that the Court ought to make the order asked for, upon the ground that Jordi, when seeking to avail himself against the defendant of the jurisdiction of an English Court, must properly be held to be amenable to any order which the Court might think right to make with a view of doing substantial justice between all the parties before it.

It would seem, however, upon principle, that although Jordi is not now before the Court, but only threatens an action against the defendant, it is equally reasonable that he should be served with a copy of the interpleader order. It is one of the first principles of all judicature that whenever there is a dispute as to the right to property or its value, all the parties interested therein should be before the Court, in order that the matter may, if possible, be finally settled and complete justice done.

Now, in the present case, the Court, by making the order asked for, does not assert any present jurisdiction over Jordi, or propose to compel him to submit to its process, but merely gives him notice of the proceedings which are being taken, so that if after such notice he should decline to submit to the jurisdiction of the Court and allow the rights as between the plaintiffs and the defendant to be determined in his absence, and hereafter commence an action against the defendant in respect of the identical claim now made by the plaintiffs, he may be barred from continuing proceedings which would be harassing to the defendant, who would thereby be twice vexed for the same cause. If Jordi has a good claim, as he asserts, against the defendant, he is not put in a worse position by prosecuting it now, instead of waiting till the action by the defendant is determined.

The question now before us does not appear to have arisen often in our Courts. The case of *Stephenson* v. *Anderson* (7) was cited as containing the high authority of Lord Eldon in favour of the view we have taken. In that case the defendant ordered goods from J. & J. Goodall in Scotland, and remitted bills to them in payment, and afterwards was sued in Scotland by a creditor named Dick, who had attached the bills in the hands of the Goodalls. The defendant wrote to the Goodalls desiring to have the bills returned, and also demanded them of the plaintiff, to whom they had been sent to procure payment of them. On his refusing to deliver them up, the defendant commenced an action of trover against the plaintiff. The plaintiff filed his bill, praying that the defendants Goodall and Dick, who were out of the jurisdiction, might interplead as to the bills, and for an injunction. This bill was sustained on demurrer, and in giving judgment Lord Eldon fully explained the grounds upon which the jurisdiction of the Court rested, as follows :—

"It was objected that the Goodalls and the attaching creditor are out of the jurisdiction; and, as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities, that proposition cannot be maintained, as a person out of the jurisdiction may threaten and bring an action; and though he should never come within the jurisdiction, there is a familiar mode of concluding him. The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. I have

(7) 2 Ves. & B. 407.

had occasion to consider that with reference to persons, not residing in Scotland, but foreigners; and the opinion I formed upon it, without any difficulty or the aid of a precedent—which I could not find, though there is precedent enough of willing defendants—is, that the plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction within a reasonable time; if he does not, the consequence is that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction when they think proper to come within it and sue either at law or in this Court. If the plaintiff can shew that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default, and upon their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and injoin that action for ever; not permitting those who refused the plaintiff that justice to commit that injustice against him."

In a more modern case—*The East and West India Dock Company* v. *Littledale* (8)—some of the parties whom it was sought to make defendants in an interpleader were Parsee merchants resident at Bombay, and the same objection was raised. The report does not disclose what was said upon the argument or in the judgment upon this point. It is clear, however, that it was brought to the attention of the Court, and also that the Vice-Chancellor (Sir James Wigram) allowed the order to go.

Our attention has been properly called by counsel at the bar to a *dictum* in *Patorni* v. *Campbell* (2), which, if effect is to be given to it, is clearly against this application. Baron Alderson says: "Besides, I do not see what right we have to bar a foreigner resident out of the jurisdiction of the Court." The judgment, however, proceeded on a different ground, and this matter does not appear to have been argued by counsel or alluded to by the other members of the Court.

Upon the state of the authorities, and for the reasons already given, I think that the present application should be granted. It is only for leave to serve the summons, and it will be open to Jordi to raise any points after it is served. As, however, the question is of some importance as affecting the practice in interpleader, we have thought it right to deal with it fully.

LOPES, J.—I agree.

Solicitors—Turner & Low, for plaintiffs; W. A. Crump & Son, for defendant.

(8) 7 Hare, 57.

1883. Nov. 26. } LOWCOCK *v.* THE OVERSEERS OF BROUGHTON.

Parliament—County Vote—Rentcharge—Actual Possession—Reform Act, 1832 (2 *Will.* 4. *c.* 45), *s.* 26—*Statute of Uses* (27 *Hen.* 8. *c.* 10).

By indenture dated the 15th of January, 1883, *A conveyed three freehold rentcharges to B, C and D, to hold to the said B, C and D, to the use of the said A, B, C and D, their heirs and assigns for ever, in equal one-fourth shares, as tenants in common*:—Held, *that the grant to B, C and D operated under the Statute of Uses, so as to give actual possession to them of the rentcharge, and to qualify them as county voters on the last day of July*, 1883, *under* 2 *Will.* 4. *c.* 45. *s.* 26.

Case stated by the Revising Barrister for the south-eastern division of the county of Lancaster.

Arthur Lowcock claimed to be inserted in the list of voters for the township of Broughton, in respect of one equal fourth-part share of certain freehold rentcharges issuing out of and charged upon property situate within the township of Broughton.

The said rentcharges, three in number, were created by one John Lowcock for

11*l.* 6*s.*, 7*l.* 7*s.* 1*d.*, and 22*l.*, to the use of himself, his heirs and assigns for ever, payable half-yearly on the 25th of March and the 29th of September.

By indenture dated the 11th of January, 1883, John Lowcock, by a deed, granted and conveyed unto his sons, Richard Lowcock, Arthur Lowcock and Frederick William Lowcock, and their heirs, the said three several yearly rentcharges hereinbefore mentioned, to hold the same unto the said Richard Lowcock, Arthur Lowcock and Frederick William Lowcock, and their heirs, to the use of the said John Lowcock, Richard Lowcock, Arthur Lowcock and Frederick William Lowcock, their heirs and assigns for ever, in equal one-fourth shares, as tenants in common.

The half-year's rent which became due on the 25th of March, 1883, being the first half which became due after the execution of the said indenture, was paid in April to John Lowcock. No portion of it was paid to either Arthur Lowcock, Frederick William Lowcock or Richard Lowcock.

It was objected that Richard Lowcock, Arthur Lowcock and Frederick William Lowcock had never been in actual possession, or in receipt of their share of the rentcharges.

It was contended, on the other hand, that the Statute of Uses operated to give them actual possession of the rentcharges on the execution of the deed of the 11th of January.

The Barrister held that the indenture operated as a reservation by the grantor of one-fourth of the rentcharges for himself, and as a gift of the remaining three-fourths to his three sons in equal one-fourth shares as tenants in common; and that as there was no third party intervening between them and the grantor the claimants took their share by force of the common law, and that the Statute of Uses did not apply. Accordingly the Barrister disallowed the claims.

From this decision Arthur Lowcock appealed on behalf of himself and his brothers, and the appeals were ordered to be consolidated.

Ambrose, Q.C., for the appellant.—The decision of the Revising Barrister was wrong. The only question is whether there was an "actual possession" for six calendar months previous to the last day of July, so as to entitle the appellant to be registered under 2 Will. 4. c. 45. s. 26.

In *Heelis* v. *Blain* (1) it was held that where a rentcharge is created by a conveyance *to uses* the grantee immediately acquires actual seisin and possession by the words of the Statute of Uses (27 Hen. 8. c. 10), and after six months is entitled to be registered as a voter in respect thereof, notwithstanding he may not have received any part of the rent. The fact that the grantor is also a *cestui que trust* together with his three sons cannot prejudice their claim to be registered as voters: for if the grantor takes by the Statute of Uses, his sons must also take by the same title, and not by the common law.—See *Burton on Real Property* (7th ed.), at p. 46. He also cited *Webster* v. *The Overseers of Ashton-under-Lyne* (2) and *Orme's Case* (3).

Nobody appeared on behalf of the respondents.

LORD COLERIDGE, C.J.—After a careful consideration of the facts, as well as the able argument which has been addressed to us, I have come to the conclusion that Mr. Ambrose's contention is correct, and that the decision of the Revising Barrister was wrong and must be reversed. The grantor by deed granted and conveyed unto his three sons three yearly rentcharges, to hold the same to the use of himself and his three sons; the question is whether that grant operates at common law, or under the Statute of Uses. But for the introduction of the grantor himself as a *cestui que trust* the Statute of Uses would have had no operation. The Statute of Uses implies that the *cestui que trust* should be a different person from the feoffee, and for this we have the high authority of Lord Bacon, who says in his *Trusts*, at p. 352, "that where the party seised to the use and the *cestui que trust* is one person, he never taketh by the statute except

(1) 18 Com. B. Rep. N.S. 90; 34 Law J. Rep. C.P. 88.

(2) 42 Law J. Rep. C.P. 146; Law Rep. 8 C.P. 306.

(3) 42 Law J. Rep. C.P. 38; Law Rep. 8 C.P. 281.

there be a direct impossibility or impertinency for the use to take effect by the common law." If the grant had been to the three sons, to the use of the three sons, the Statute of Uses would not have applied, and in order to make it effective it would have required an entry or receipt of the rents and profits. The decision in *Heelis* v. *Blain* (1) is in point, and has not been overruled, and that case established that a conveyance which operates under the Statute of Uses gives that actual possession which satisfies the 26th section of the earlier Reform Act.

It occurred to me at one time that the conveyance was one which might have operated partly at common law and partly under the Statute of Uses; but it seems there is high authority for saying that this view is not correct. Mr. Burton, in his *Law of Real Property*, 7th ed. at p. 46, lays it down that "if A be enfeoffed to the use of himself and B, although by a literal construction of the statute B would take his share of the estate by Act of Parliament, leaving A to take his immediately by the feoffment, it has been decided that they are both in by the statute." As the father, therefore, in this case, would take his portion of the tenancy in common by the Statute of Uses, it seems established that all the parties would take by the same title. That being the true construction of the statute, upon the authority of *Heelis* v. *Blain* (1), I think that the Revising Barrister decided wrongly in disallowing the votes.

HAWKINS, J., and MATHEW, J., concurred.

Decision reversed.

Solicitors—Johnson & Weatherall, agents for Wigglesworth & Rogerson, Manchester, for appellant.

[IN THE COURT OF APPEAL.]

1884. Jan. 15, 16, 17.

THE ATTORNEY-GENERAL *v.* HUBBUCK AND OTHERS.*

Revenue — Probate Duty — Real Property forming part of Partnership Assets— Agreement to convert — Effect of Will dealing with it as Realty.

Certain land and premises were held as part of the property of a partnership. The partners considered this property to be realty, and, in answer to an information claiming probate duty on the value of the share held by one of the partners who had died, it was alleged that it had been agreed between them that the deceased should make a will dealing with this property as realty, that the will was submitted to and approved of by the other partner, and then duly executed and proved, and therefore that there had been a re-conversion of that part of the partnership property into realty, and that it was not liable to probate duty:—Held, *affirming the judgment of the Queen's Bench Division, that the property was liable to probate duty; that even if such an agreement as that alleged was contemplated, there was no evidence of any binding enforceable agreement which would take effect in the lifetime of the testator so as to take the property in question out of the partnership assets and thus reconvert that into realty which, being partnership property, is considered for the purposes of fiscal duties to be personalty.*

Appeal by the defendants from the judgment of the Queen's Bench Division. The case is reported 52 Law J. Rep. Q.B. 464.

Information by the Attorney-General to recover probate duty in respect of a sum of 22,150*l.*, alleged to be part of the personal estate of William Augustus Hubbuck, deceased, which having been bequeathed by him to his widow, since deceased, was also alleged to have formed part of her personal estate.

The information stated that in 1849 Thomas Hubbuck, the defendant Edward Martin Hubbuck, and William Augustus Hubbuck, entered into partnership, on the

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

terms, amongst others, that if one of the partners should die or retire the others should purchase his share. During the partnership Thomas Hubbuck bought for the partnership certain freehold and copyhold premises, which were used for the partnership purposes. Thomas Hubbuck afterwards retired, and then conveyed these premises to the other two partners, to be held as partnership property.

In 1878 William Augustus Hubbuck made his will, in which he appointed his wife Eliza Hubbuck, and the defendants Edward Martin Hubbuck and Frederick Furze, his executors. He directed by this will that his share of the capital in the business at the time of his decease should, at the discretion of his executors, be allowed to remain in the business, in the hands of his brother, at five per cent. per annum interest payable half-yearly, for seven years next after his decease, or for such period as his said brother and his other executors should mutually agree upon. The testator also declared that his share of the freehold premises in which the said business was carried on, instead of being taken at a valuation by his said brother as surviving partner, or being sold, should be leased to his brother or to the firm at a yearly rent equal to five per cent. per annum on the value of such premises as the same should be stated in the stock-taking account last signed prior to his decease, and for such term or terms as his said executors and his said brother or the firm should agree upon; and he also authorised his executors to sell to his said brother, as surviving partner, his share of the capital, stock and effects of the business at the time of his decease, and his share of the freehold premises, or any or either of them, for his share of their value, according to the valuation at the last stock-taking account prior to his decease; and, subject to the foregoing directions, the testator devised and bequeathed all his real estate, and the residue of his personal estate, unto his executors, their heirs, executors, administrators and assigns, upon trust either to continue the same or any part thereof in the existing investments, or to sell and convert the same into money; and, after payment of debts, funeral and testamentary expenses and legacies, to invest the clear surplus thereof upon certain securities, and out of the resulting income to pay an annuity of 1,000*l.* to his wife for life, for the use of herself, and the maintenance, education and benefit of his child or children for the time being under twenty-one, or (being daughters) unmarried; and, subject thereto, his said trustees were to hold his residuary estate upon trust for his wife absolutely.

William Augustus died shortly after, and his will was duly proved. The estate was sworn under 60,000*l.*, not including therein the value of the testator's interest in the real estate so purchased.

Edward Martin Hubbuck continued the business, and he paid to the executors of William Augustus Hubbuck, in respect of the share of the deceased in the premises, an annual sum calculated at five per cent. on the valuation of the premises at the last stock-taking before W. A. Hubbuck's death; but no lease of these premises was made to him.

The widow, Eliza Hubbuck, died in 1880, having made a will in which she appointed the defendant Edward Martin Hubbuck and her two sons her executors. She thereby confirmed and directed her executors to do all acts which might be necessary to confirm the options, powers and provisions contained in the will of William Augustus Hubbuck with respect to the freehold premises, and with respect to his share of the capital in the partnership business; and, subject thereto, she gave the share of her late husband in the said freehold premises unto and equally between all her children as tenants in common; and, in case during her lifetime her interest or the interest of her late husband in any part of the said freehold premises should be purchased by her said brother-in-law or any other person, then a sum equal to the purchase-money paid or payable to her or to her late husband's estate was to be divided equally amongst her children. And the testatrix gave the residue of her real and personal estate to the defendants William Hubbuck and Augustus George Hubbuck absolutely.

The will was duly proved, but no probate duty was paid upon the value of her interest in the proceeds of the sale of the real estate already mentioned. After her

death the defendant Edward Martin Hubbuck purchased the share of William Augustus Hubbuck in the real estate belonging to the late partnership, and he became entitled in fee to the whole of the said premises. He paid 22,150*l.* for this share, but no probate duty had been paid on that sum.

The Commissioners of Inland Revenue claimed probate duty on that sum in the case of the wills of both William Augustus and Eliza Hubbuck; but the defendants refused to pay, on the ground that the real estate belonging to the partnership was not personal assets for fiscal purposes.

The defendants, in their answer, stated, amongst other things, that the original partnership had been dissolved, that there was a new partnership at will between Edward Martin and William Augustus Hubbuck, that the partners were entitled to profits in equal shares, and that the two partners were considered as entitled to the business premises of the partnership in equal shares; that until William Augustus made his will there had been no stipulation as to the rights of the survivor, and that they both thought the share of William Augustus in the real property belonging to the partnership business would, in case of an intestacy, pass to his eldest son as heir-at-law. They therefore discussed the matter, and came to an agreement that provisions to prevent this should be made by William Augustus in his will, and that his will was made in pursuance of that agreement. The defendants contended that probate duty was not payable, on the ground that the partnership real estate was not personal assets (at all events for fiscal purposes), having regard to the express agreement made between William Augustus and Edward Martin Hubbuck that the former should make such provisions with respect to his share in the freehold premises as were embodied in his will. The defendants contended that this agreement was made shortly before the execution of the will at the house where William Augustus was then lying ill; but they admitted that, except as appeared by the will itself and certain drafts, they were unable to state the words in which the agreement was made. The draft of the will of William Augustus was prepared in pursuance of instructions given by Edward Martin, who took the fair copy and read it over to the testator, who then executed it.

The Queen's Bench Division gave judgment for the Crown.

The defendants, the executors of the two wills, appealed.

Ince, Q.C., and *Maidlow* (with them *Grantham, Q.C.*), for the defendants.—The question is, whether the land was converted by the rules of equity from realty into personalty. The authorities with regard to the doctrine of conversion shew that money agreed or directed to be laid out in land becomes land so completely as to acquire all the properties of land, so that it will be considered as real and not personal assets —*Fletcher* v. *Ashburner* (1). The direction to convert either money into land or land into money must be imperative; and although land absolutely directed or agreed to be converted into money, or money into land, immediately becomes impressed with the character of the property into which each is to be respectively converted, yet this theoretical conversion may be put an end to by an absolute owner electing to take the property in its actual state—*White and Tudor's Leading Cases* (2). Very slight circumstances will be sufficient to raise the presumption that a person has made an election, notwithstanding that there is a trust for sale. Here the trust for sale, although operating as a conversion, did not arise until the death of William Augustus Hubbuck—*Bell* v. *Phyn* (3) and *Thornton* v. *Dixon* (4). The conduct of the partners shews an intention that the realty which formed part of the partnership property was to remain and to be treated as realty. The rule in equity that a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, is not applicable here, because the idea of conversion from realty into personalty is inconsistent with the conduct of

(1) 1 Bro. C.C. 497; 1 White & T. L. Cas. p. 896.
(2) Vol. 1, pp. 917, 928, 933 (5th ed.).
(3) 7 Ves. 453.
(4) 3 Bro. C.C. 199.

the parties—*Lindley on Partnership* (5), *Steward* v. *Blakeway* (6), *Darby* v. *Darby* (7), *Rowley* v. *Adams* (8) and *Cookson* v. *Cookson* (9). Moreover, there is authority, wholly apart from the question of presumptive conversion or reconversion, to shew that no probate duty is payable unless there is an actual sale for the purpose of winding up the partnership—*Custance* v. *Bradshaw* (10). That case is quite consistent with *The Attorney-General* v. *Brunning* (11).

[BRETT, M.R., referred to *Forbes* v. *Steven* (12).]

As to the second question, it does not follow that when property once becomes personalty it always remains personalty; even if Eliza Matilda Hubbuck took the property as personalty, she did not bequeath it as personalty. The fact is that it was treated as realty, as appears from the estate account books.

Sharp v. *St. Sauveur* (13), *Waterer* v. *Waterer* (14), *Pilling* v. *Pilling* (15), *In re De Lancey's Succession* (16), *Dinham* v. *Bradford* (17), *The Attorney-General* v. *Lomas* (18) and *Lewin on Trusts* (19) were also referred to.

The Attorney-General (*Sir H. James, Q.C.*), and *V. Hawkins*, for the Crown.—It is admitted by the appellants that this property was partnership property, and must therefore be considered personalty, so that it is necessary for them to shew that there was some valid agreement by which it was reconverted into realty, and that reconversion must be shewn to have taken place in the lifetime of the person in respect of whose will probate duty is charged. The will therefore cannot affect the question. There was no binding agreement made in the lifetime of W. A. Hubbuck, nor could any such agreement as is suggested be made, for the property could not be taken out of the partnership assets and yet remain partnership property.

The Attorney-General v. *Brunning* (11), *Forbes* v. *Stevens* (12), *Waterer* v. *Waterer* (14) and *Matson* v. *Swift* (20) were cited.

With regard to the probate duty claimed in respect of the will of the widow, it is to be observed that the property was sold, and that there was money actually received from the sale and paid to her representatives.

They were stopped by the Court on this point.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Court below was correct. It is admitted on all hands that real property which forms part of the property of a firm is impressed by the law of England with the character of personalty. Reasons have been given for that, but into those reasons it does not appear to me to be necessary to go, for it appears to me that it is established and acknowledged that real property, held in the manner which I have described, is, for the purposes of the partnership, changed by the law of England from real into personal property. In a sense, this is, as has been said, figurative language; but still for practical purposes, for the purposes of duties to be paid, such land is treated by the law as personal property.

I understand it to be admitted that, by any binding agreement enforceable either in a Court of law or a Court of equity, the provisions of which are to take effect in the lifetime of the parties, this rule of law may be superseded. But it can only be superseded if the portion of the property which is made the subject-matter of such an agreement is, from the time when that agreement is made and operates, taken out of the partnership property so that it ceases to be governed by the rules of law which apply to partnership property.

(5) P. 667 (4th ed.).
(6) Law Rep. 4 Chanc. 603.
(7) 3 Drew. 495.
(8) 7 Beav. 548.
(9) 8 Sim. 529.
(10) 4 Hare, 315; 14 Law J. Rep. Chanc. 358.
(11) 8 H.L. Cas. 243; 30 Law J. Rep. Exch. 379.
(12) 39 Law J. Rep. Chanc. 485; Law Rep. 10 Eq. 178.
(13) 41 Law J. Rep. Chanc. 576; Law Rep. 7 Chanc. 343.
(14) Law Rep. 15 Eq. 402.
(15) 3 De Gex, J. & S. 162.
(16) 41 Law J. Rep. Exch. 64; Law Rep. 7 Exch. 140.
(17) Law Rep. 5 Chanc. 519.
(18) 43 Law J. Rep. Exch. 32; Law Rep. 9 Exch. 29.
(19) P. 51 (5th ed.).
(20) 8 Beav. 368; 13 Law J. Rep. Chanc. 354.

The Attorney-General v. *Hubbuck, App.*

A number of cases have been cited, but it seems to me enough to cite the case of *The Attorney-General* v. *Brunning* (11), for the language of Lord Cranworth, in moving the judgment of the House, seems to me conclusive, and the language used by him expresses in short and clear terms the opinion of the whole House. Lord Cranworth dealt with the two cases of *Matson* v. *Swift* (20) and *Custance* v. *Bradshaw* (10), and he pointed out that those cases, in the sense in which they have been ordinarily understood, were not law; but he pointed out the sense in which they were law, and, in expressing his opinion of what they really do decide, he explained very clearly what his own notion of the law was. He said, "In *Matson* v. *Swift* (20), before Lord Langdale, the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his direction—a direction, it is true, declared not by his will but by a previous deed, which, however, he might have revoked or varied by his will if he had thought fit. And the conversion into personalty, therefore, may truly be treated as having depended on his will." That, Lord Cranworth said, was the true effect of that decision, and he said that the decision was right because it treated the conversion which was to be considered as made by the will as made too late, inasmuch as it was made after the death—that is, after the time at which the fiscal duties, whatever they were, attached—duties which could not in any way be altered by the will made, which could only operate at the time subsequent to the death. Then Lord Cranworth proceeded to say, "In *Custance* v. *Bradshaw* (10) Sir James Wigram proceeded upon the same ground—namely, that at the death of the testator the property in question was real estate, and that if it was ever to lose that quality it would be by some act to be done after the testator's death, and which might never become necessary." In that passage of Lord Cranworth's judgment, and the exposition that he gives, the law is laid down, I assume, correctly; but that is immaterial, because he was speaking in the House of Lords. In that way, therefore, it seems to me that Lord Cranworth lays down that, such as the property is, and such as the character is that is impressed upon the property by the law at the time when the breath leaves the body of the person, such is its character for the purpose of the fiscal duties which attach to it. Now that seems to me to be clear, and the question here is, whether there is anything in the evidence or the documents before us to establish a binding agreement, which was to take effect during the lifetime of the parties, which could be enforced in law or equity, so as to take the property in question out of the partnership assets. The way it is sought to be taken out is, as I understand it, this: There was a certain quantity of real estate occupied by the partners and used for the partnership business. In the absence of anything to the contrary (and indeed it is admitted that it would be so but for the agreement to which I advert), that would be treated as personalty, would pass to the executors of the partner, and have to pay the duties which are levied upon it and which are now in dispute before us. But it is said that the two brothers William Augustus and Edward Martin agreed during their lifetime, in order to prevent an intestacy as to this real property and the effect of an intestacy, which would be, as the two brothers thought, inconvenient to the business, that one of them (whichever of them might die first) might make a will, might by that will take the property out of the ordinary rule of law with regard to partnership property, and might convert it by the effect of his will into real estate, and therefore into estate that would not be subject to the duties which are now claimed upon it.

It is admitted there is no direct evidence of any such agreement. The indirect evidence of the agreement is said to be the existence of the will to the provisions of which our attention has been called. The will was made, it appears, in the lifetime of William Augustus, but when he was very ill; and I believe, certainly as regards the matters now under discussion, all the provisions of that will were submitted to Edward Martin the other brother. Edward Martin appears to have been the go-between between William Augustus his brother (who was ill in bed) and the gentleman who drew the will.

He took the instructions, and, as I understand, saw the solicitor upon the subject; and it is stated, and not denied, that he was fully cognisant of the provisions of that will as far, at all events, as regards the matter now in dispute before us. It is said, first of all, on the assumption that it is clear that this will did operate to turn the estate from personalty into realty, that it is shewn that there had been an agreement made in the lifetime of both (whether it was enforceable or not I will consider in a moment), and that, in pursuance of that agreement, William Augustus Hubbuck in his last illness made, with the knowledge of his brother, the will which is said to have effected the change in the character of the property in this case.

First of all, it does not appear to me that there was any binding agreement between these parties at all. If there is an agreement between two parties that, in consideration of each of them doing some particular thing, some result should follow upon a particular portion of the partnership property, I quite agree that that might quite conceivably have the incidents of a legal agreement between them —an agreement perfectly enforceable in some Court or other: at present, at all events, in the High Court—and that such an agreement, if it was properly conceived, would at the time of its coming into existence operate, or might operate, to change the character of the property in the way in which it is said that it did here. But in this case there was, as it seems to me, no such binding agreement at all. There was no consideration at all for this agreement given by the person who now seeks to take advantage of it, if agreement there were. There was nothing at all at the very outside that can be collected from the will but a permission to William Augustus, if he thought fit, to make this will, and if he did not think fit he was at liberty not to make it; further, it was a will which, even if he made it, it was within his power to revoke; and it is admitted, or at least very faintly denied, that if he had died without making the will, or had made the will and revoked it, there could be no doubt that the property in question would be personal property, and that the Crown would be entitled to the duties claimed. Then, without a binding agreement, and merely by the operation of a will of which, putting it at the outside, his brother was aware—which, by the very necessity of the case, could not operate until after the partnership had been dissolved by death—what is there to shew, or what ground is there for saying, that such a will would be any evidence of such an agreement as I have spoken of—or if it were evidence of such an agreement, what agreement was there that the law would sanction?

Upon this last matter I do not desire at the present moment to say anything, because I believe we are not altogether agreed as to the possibility in law of such an agreement. I prefer, therefore, if possible, to base my decision in this case upon a ground on which, I believe, we are all agreed. It seems to me that, even if this will did clearly effectuate what it was intended to effectuate, and even assuming the true construction of this will to be that which is contended for on the part of the appellants, the will itself is not sufficient to turn this property from personalty back into realty. But when one looks at the will itself, I entertain the gravest doubts whether, whatever might have been the actual intention of the parties, the language of this will was such, according to the ordinary rules of construction, as to effect the change in question.

I cannot say whether all the members of the Court agree in the view I am now about to give utterance to, but it is my own view. In the answer, the views of the two brothers are set out by those who represent William Augustus and Edward Martin, and it is there stated that the object for which the will was drawn up and executed was to carry into effect the agreement which has been suggested—namely, that it should be turned from personalty back into realty; but that the will was made on the assumption that it was realty already, in order that an intestacy should be avoided, so as to prevent the inconvenience to the partnership business which an intestacy would produce. I do not mean to say at all that, if the will had in clear terms made the change (supposing it could do so) of this property from personalty into realty, the private

intention of the maker, or the private intention of the person who stood by and let him make it, could be properly considered in construing the will; but when the question is a question of an antecedent agreement, and whether there is evidence before us to-day of the particular thing, the circumstance that the two parties to that agreement never dreamed that the thing needed to be done at all, is, I cannot help thinking, a very strong fact to be considered on that point. If it is plain that the two parties believed in a state of things which would make an agreement unnecessary, it strikes my mind as reasonable to assume that they could not have made an agreement which by the hypothesis they had no reason for making.

We come, then, to a consideration of the will, with this strong fact, that there is not only no direct evidence consistent with, but that there is considerable evidence which is inconsistent with the agreement which is suggested ever having existed in point of fact. The terms of the will might undoubtedly have been more clearly expressed; but, so far as I presume to judge, the true effect of the will is by no means more than to effect a dealing with this property as property in which the testator had a share, in words which might indicate that he considered it real property —for the language is capable, no doubt, of being construed to the effect that he supposed he was dealing with a share in real property; but it is equally consistent with another construction, and I think that that is really the true effect of the will.

This freehold property having been taken into the account in the first instance in estimating the share of the capital of the partnership, with a portion of which the testator Hubbuck was dealing, he went on to say, with regard to so much of the partnership property as consisted of these freehold premises, his share in that portion of the partnership assets should be disposed of in a particular way: that his brother, if he liked to do certain things, might have the option of becoming tenant of or of occupying the property at a certain fixed sum: that fixed sum to be ascertained by taking a certain value appearing in the stock-taking book. He does not in terms say what shall be done in case his brother does not elect to take it; but after making certain other provisions he deals with this freehold house, and says: "As to my real estate, and as to all residue"—and so forth —"of my property, I bequeath" it in a particular way. It was not denied, I think, that, supposing there had been no sale to the brother, the brother was to occupy it at a certain rate, paying a certain sum, and, if he chose, he was to buy it for a certain sum. That sum was also to be ascertained by reference to the last stock-taking. It was scarcely denied that, if the brother had elected neither to occupy nor to buy, there was nothing in the nature of the case to compel him to do so; and then the operation of the will would have been under the general clause dealing with the property, if it did deal with it, and the property would have been treated as part of the residue, which would otherwise have been unprovided for.

It seems to me that there are no words in this will which could operate on this property, assuming it to have been personal property. There is nothing in the will to shew that, in execution of an agreement between the parties, it was turned from personalty into realty. All that it could effect was that the brother, who was acquainted with the provisions of the will, could be prevented from denying in any Court of equity that the will had the operation and bore the construction which it appeared to have and to bear.

On this ground, therefore, both upon principle and upon the facts of the case, the Crown must succeed on the first claim. With regard to the second claim, it is enough to say that the arguments which apply to the will of William Hubbuck apply to the will of the widow, and therefore that the Crown is entitled to succeed upon the second claim as well as upon the first.

The judgment of the Queen's Bench Division must therefore be affirmed.

BRETT, M.R.—In this case the Crown claims duty upon property which it says was personal property at the time of the death of two persons, each of whom made a will. It has been argued in answer that the property in question was real property, and therefore that no probate

duty was due; and it was further said that, even if the property was in equity personal property, nevertheless, inasmuch as it was in reality land, the Crown cannot recover probate duty in respect of it. As to the second point, I should have decided it clearly in favour of the Crown, apart from authority; for if at the time of the death the property is in law—whether by the common law or in equity—personal property, the very words of the Probate Act strike it. But the case of *The Attorney-General* v. *Brunning* (11) is distinct upon this point, whether it is or is not an authority upon the other. It is then said that this property had become land, both at law and in equity, on the death of both the testators.

Many questions have been raised in argument with which it is unnecessary to deal.

The facts of this case, which are undisputed, and the law of the case, which is undisputed, are these: that although part of the partnership property here was in fact land, and therefore at common law would always remain land, yet, by reason of the equitable doctrine, inasmuch as this land was made a part of the partnership assets, it was in equity personal property. There is no dispute that the terms of the partnership articles were such that this land did go into the partnership articles, unfettered in any respect, as part of the partnership property in equity. It is admitted that it would remain so in equity until the death of the first partner, at all events, and would be personal property in equity at his death unless there was something which in equity reconverted the property.

It is said that the property could be reconverted by the election of the partners; but it cannot be asserted that the election of one of the partners would do: it must be the election of both; and it seems to me that nothing will constitute an election in equity but that which would be a binding agreement in law. Now, an agreement is not binding unless some remedy can be given in respect of a breach of it either in law or equity, for otherwise either party may break it without any legal consequences. There must therefore be a binding agreement. Further, it seems to me, on the authority of *The Attorney-General* v. *Brunning* (11), that to reconvert this land which had become partnership property so as to make it land at the death of William Hubbuck, there must have been a binding contract the due performance of which would affect the property during the life of William Hubbuck. If the performance of the binding contract would only affect the property after his death, then it has not affected it at the time of the death; and that appears to me to be in substance the governing proposition contained in *The Attorney-General* v. *Brunning* (11). Was there, then, any binding agreement between these partners? A promise to make a will is not binding, and cannot be enforced. That was laid down both here and in the House of Lords in *Alderson* v. *Maddison* (21). It is not said that there was such a promise, but it is said that Edward agreed that William might make a will dealing with this property as land. Let that be so: still there is no consideration for such an agreement; and Edward might retract from such an agreement at any moment. What is really vouched here is an agreement that William may make a will dealing with his property as land; and Edward agrees, not that if William makes, but that if William leaves a will dealing with the property as land, then the property shall be so treated. There was no consideration which bound Edward to continue that permission; therefore it was a contract which could never be enforced against him. In other words, permission is not agreement. A permission given for a consideration is irrevocable, and constitutes an agreement; but, this permission being given without consideration, could be retracted at any time before death. But even if there was consideration, the agreement was that property might be affected in a particular way by a will: the contract, therefore, if performed, would only affect the property after the death of one of the partners. Then, according to the view of Lord Cranworth in *The Attorney-General* v. *Brunning* (11), I should be of opinion that, even though the suggested agreement had been made out,

(21) 52 Law J. Rep. Q.B. 737; Law Rep. 8 App. Cas. 467.

yet no will, whatever its form, could have reconverted this property so as to make it other than personal property at the time of the death of the testator. But is the alleged agreement made out? The case states that the will supplies the only evidence of what the agreement was, and that to see whether there was an agreement that the will should be made in the suggested form the will itself must be looked at. The construction of the will is difficult; but on the whole I am of opinion that the will does not treat the property as land, and that, if it does not, then there was no agreement that the property might be treated as land, and therefore, for that reason also, it must be treated as still being personalty, within the equity doctrine, at the time of the death of William.

But I do not say that, if some other suit had been instituted or some other dispute had arisen, the fact of an agreement would have been immaterial, because it might, taken together with the will, have estopped Edward in equity from saying that the will was not properly made. That, however, is not material in the present case, because there is no estoppel against the Crown, and the rights of the Crown must depend upon what was the actual condition of the thing. The Crown, therefore, is entitled to probate duty from those who took this property under the will of William Augustus.

It was then urged that, if the appellants were wrong upon this claim, still the case was different as to the property passing under the will of the widow. It was said that, if the widow took it as personal property from William, yet that she and Edward had before her death reconverted it into land. It was said that this land was treated in certain account books as freehold land for which rent was to be paid. Those books were kept by Edward; they were accounts with the executors; they did not establish that the payment was treated as rent, and the books did not shew that there had been any conversion. It was said, further, that the widow had treated it in her will as land; but that does not strengthen the case, for there is no evidence of any agreement with Edward that she might do so.

I think that the case of *Custance* v. *Bradshaw* (10) can no longer be considered an authority which can be cited for any useful purpose. Our judgment must be for the Crown on both heads of claim.

BOWEN, L.J.—We start in the present case with this, that the land in question was at one time partnership property, and that it remained partnership property, to all intents and purposes, at all events down to the exact date at which the alleged agreement between the partners was arrived at—that is to say, until the alleged agreement between the partners that the property should be dealt with by one partner in one way. Now, if it was partnership property it was personal property, and the reason is this: It is an established principle in equity, that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done, as done already; and it impresses on the property that species of character into which it is bound ultimately to be converted.

This doctrine necessarily affects partnerships. Partnership property is that which is held by the partners, as such, for the purposes of the partnership; it is, to start with, held, first of all, for carrying on the adventure of the partnership, and may be wanted for that purpose; and, moreover, at the time of the winding-up of the partnership, the debts of the partnership will have to be paid, and the question of amount must be settled between the partners, and then the unexhausted assets divided between them. The partnership assets will have to be converted into money, and after they have been thus converted they must first be applied to the liquidation of the partnership debts. The partnership property will have to be treated in the end as subject to a trust for sale, and therefore it is personal property. That is explained in *Darby* v. *Darby* (7), which is cited in the judgment of the Court below. If that is so as regards all the partnership property, land, when brought into and made part of the partnership property, becomes of course

personalty—that is to say, its devolution will be affected by the fact that it has been brought into the partnership accounts and assets. How, then, can this imputed character of personalty be altered and the land become again realty? It must be by an agreement made between the partners such as would withdraw the land from the partnership assets. If it was made out that the partners had, during the partnership, agreed that at the death of one of the partners the land should not be sold or dealt with as part of the partnership assets, but be held on a tenancy in common, I am not prepared to say that that land might not cease to be personalty; but it is not necessary to decide this. If it is withdrawn from the partnership assets *pro tanto*, to that extent it seems to me that the reason why it is considered personalty might possibly be affected. Nor should I be prepared to hold that, however unusual in business it might be, the parties might not agree that a portion of the partnership property should, upon a given event happening, be withdrawn from the partnership assets, and that the effect of such an agreement might not be that which is contended for. But it seems to me clear—whatever may be the law about that—that the moment the death of the partner takes place is the moment at which it has to be decided whether the property in question is realty or personalty—the moment, that is, at which the title has to be decided; and it is plain, to my mind, that whatever agreement is to affect the character impressed upon the property at this specific moment of time must be, in the first place, a binding agreement; and, in the second place, it must be a binding agreement which shall take effect before or, at the latest, at the moment of death, for the purpose of determining whether the property is to bear the character of personal or real estate so far as regards its devolution.

Now, in order to consider how far the above reasoning affects the present case, let us take, first of all, something outside partnership altogether. Take the case of a man who can, by his election, reimpose the character of realty upon land which, but for his election to do so, would continue to be treated as personalty: he must make that election by some act at all events not subsequent to his death; he cannot leave a will which, after he is dead and buried, shall decide what is to be the devolution of his property at the moment of his decease. As the other members of the Court have said, it is the moment at which the breath leaves the body that is the critical moment. I need only refer for further illustration of that to the case of the *Attorney-General* v. *Brunning* (11), and to the observations contained in the judgment of the House of Lords upon the subject. If that is so, and if a will which can only operate after the death of a man is too late to operate as an election on his part which will reimpose the character of realty upon that land which has been personalty until then, it seems to me that an agreement between two persons (an agreement being, *ex hypothesi*, the only possible way in which the personal estate is to be changed to realty) will not do unless it is not merely binding, but is an agreement which becomes binding before the death, so as to take effect at the death. An agreement would not, it seems to me, be sufficient which only became binding by reason of one party having performed his part of the agreement by his will, it would then be an agreement which only became a binding agreement by something which would be performed too late to have any effect upon the character of the property: it would be an agreement for reconversion depending upon the terms of a will which would only take effect after the liability to the duty had attached. It seems to me that the *Attorney-General* v. *Brunning* (11) shews that this would not do. What, then, is the character of the agreement upon which the appellants relied? First of all, was there a binding agreement at all in the first instance? I will not say whether there was sufficient mutuality between the parties to make what was done between them binding or not. I do not think it is necessary to say that any agreement between partners to change the terms of partnership has not sufficient consideration to support it. It has also been suggested that it became a binding agreement by virtue of the fact

that one party was allowed by the other to act upon it upon the faith of its being one to which the first party would submit. Assume, for the sake of argument, that to be so. Still it falls within the difficulty I have indicated—namely, that it becomes binding only by reason of being performed by a will; that is, by reason of being performed by something which takes effect too late. But supposing it was a binding agreement from the outset. What was the agreement? It was an agreement that property should be affected by a will—and, in that view of the case, it again falls under the same difficulty: it is an agreement that certain property shall be affected by something which is done too late to affect it. However, I will assume that all these difficulties might be got over by the appellants. I will assume, for the purpose of argument, that they make out their case that there was a binding agreement that one of the partners should affect his share of the property by a will; and I will assume, for the purposes of argument, that that would be sufficient, and would not fall within the judgment of the House of Lords in the *Attorney-General* v. *Brunning* (11). Take it that there is an agreement to affect this property by will. At most it cannot be an agreement to affect it further than the will does affect it, or is thought to affect it. I have studied this obscure document, the will, over and over again, and I must confess that I cannot myself see any clear indication of an intention to withdraw this share from the partnership assets; and if it had once been partnership assets it lies with those, I think, who wish to withdraw it from the position of partnership assets to shew that it was so withdrawn; and they only point to a will which seems to me to be ambiguous, if it is not indeed more in favour of its remaining partnership assets than in favour of the idea of its being withdrawn from them. For these reasons I agree with the view which has been expressed by the Lord Chief Justice and the Master of the Rolls with regard to the first part of the case; it is substantially, I think, the same ground as that upon which the Court below decided the case.

With regard to the second part of the case—that is, as to the claim made by Crown for duty on the death and will of Mrs. Hubbuck—I do not wish to add anything to what has been already said.

Judgment affirmed.

Solicitors—Stones, Morris & Stone, for appellants; the Solicitor of the Inland Revenue, for the Crown.

[IN THE COURT OF APPEAL.]

1883. Nov. 9. 1884. Feb. 23. } JACOBS, MARCUS AND COMPANY *v.* THE CREDIT LYONNAIS LONDON AGENCY.*

Contract — Construction of — Non-performance—Force majeure—Part Performance abroad—Conflict of Law—French Civil Code.

By a contract made in London between the plaintiffs and the defendants, both of whom carried on business in the city of London, the defendants agreed to sell to the plaintiffs 20,000 *tons of esparto, to be shipped from Algeria by monthly shipments, on ships to be provided by the plaintiffs; payment was to be made by cash on arrival of the ships at their port of destination; the goods were to be approved by the plaintiffs or their agents at the manufactory before being baled, and if necessary were to be warehoused at the port of loading at the plaintiffs' risk; also any disputes arising were to be settled by arbitration, and this clause was to be made a rule of the High Court on the application of either party.*

In an action to recover damages for non-performance of the contract, the defendants pleaded that in consequence of an insurrection in Algeria and the military operations connected therewith, they were unable to perform their contract, and that by the French Civil Code which prevailed throughout Algeria force majeure was an excuse for non-performance of the contract:—

Held, *upon demurrer, that, in the absence of any intention either express or implied*

* *Coram* Brett, M.R, and Bowen, L.J.

on the part of the contracting parties that the French Civil Code should be applied to the contract, it must be construed according to English and not French law; so that the defence of force majeure was no answer to the action.

Appeal by the defendants from a judgment of the Queen's Bench Division (Denman, J., and Manisty, J.), upon a demurrer to certain paragraphs of the defendants' statement of defence and upon a demurrer to the defendants' rejoinder to the reply.

The facts are fully stated in the judgment of the Court.

The Solicitor-General (*Sir Farrer Herschell, Q.C.*) and *Channell*, for the defendants.—The question is whether a contract of this description which provides for the performance of certain things in a foreign country is to be governed by the law of the place of performance or by the law of the place where the contract is made. The point was raised, but not decided, in *Scott* v. *Pilkington* (1). The defendants are sued for non-performance of certain things which must be done in Algeria; the contract must therefore be regulated by the law of that country where the law of the French Civil Code prevails, which provides that *force majeure* will excuse non-performance of the contract—see sect. 1148. The principle contended for is laid down in *Westlake's Private International Law* (ed. 1858), sect. 167, "If the parties stipulate for the performance of their contract at a particular place, it is by the law of that place, as that where the omission to perform is committed, that the obligations flowing from non-performance must be ascertained." The essential part of this contract was to be performed in Algeria; the French law as to that would therefore govern this contract—*Cohen* v. *The South Eastern Railway Company* (2). Again, it is stated in *Story's Conflict of Laws*, sect. 280, that, "The rules already considered suppose that the performance of the contract is to be in the place where it is made either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." The place of performance governs not only the formalities as to performance, but also the obligations of performance and the rights and liabilities for non-performance—*Story's Conflict of Laws*, sect. 242. *Medeiros* v. *Hill* (3), *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (4), *Rouquette* v. *Overmann* (5), *Robinson* v. *Bland* (6), *Lloyd* v. *Guibert* (7), *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company* (8) and *Chamberlain* v. *Napier* (9) were also cited.

Sidney Woolf (with him *Forbes, Q.C.*), for the plaintiffs.—Upon the true construction of this contract *force majeure* in Algeria is not a good defence to the action. The contract was made in England; the esparto was to be delivered on board English ships, and that was an important and necessary part of the defendants' contract which they were bound to perform, or, in default, to pay damages. The only event on the happening of which the contract is *pro tanto* to be void is in the case of a total loss; in case of any dispute arising it is to be settled by arbitration. The contract is in every respect an English contract, and is to be construed as such—*Rouquette* v. *Overmann* (5), *Barker* v. *Hodgson* (10), *Sjoerds* v. *Luscombe* (11), *Spence* v. *Chodwick* (12) and *Greer* v. *Poole* (13) were referred to.

(1) 2 B. & S. 11, 39; 31 Law J. Rep. Q.B. 81.
(2) 46 Law J. Rep. Exch. 417; Law Rep. 2 Ex. D. 253
(3) 8 Bing. 231; 1 Law J. Rep. C.P. 77.
(4) 3 Moore P.C. N.S. 272.
(5) 44 Law J. Rep. Q.B. 321; Law Rep. 10 Q.B. 525, 541.
(6) 2 Burr. 1077; 1 W. Black. 258.
(7) 35 Law J. Rep. Q.B. 74; Law Rep. 1 Q.B. 115, 122.
(8) 52 Law J. Rep. Q.B. 220; Law Rep. 10 Q.B. D. 521, 528.
(9) 49 Law J. Rep. Chanc. 628; Law Rep. 15 Ch. D. 614.
(10) 3 M. & S. 267.
(11) 16 East, 201.
(12) 10 Q.B. Rep. 521, 528, 530; 16 Law J. Rep. Q.B. 313.
(13) 49 Law J. Rep. Q.B. 463; Law Rep. 5 Q.B. D. 272.

The Solicitor-General, in reply, cited *The Halley* (14).

Cur. adv. vult.

The judgment of the Court was delivered (on Feb. 23) by

BOWEN, L.J.—The plaintiffs in this case are esparto merchants, carrying on business in the city of London, and the defendants are a banking firm, also carrying on business in the city.

By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on board ships or steamers to be provided by the plaintiffs: payment to be made by cash on arrival of the ship or steamer at her port of destination. The defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder; and this action was brought by the plaintiffs for its non-delivery. The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria and the military operations connected with it had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance. The plaintiffs demurred to this defence on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other ports of Algeria where *force majeure* did not exist. The defendants to the latter allegation rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Court of Queen's Bench having given judgment upon both demurrers for the plaintiffs, the case now comes before us upon appeal. The question which we have in substance to consider is, whether non-performance of their agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognised by the French Civil Code which prevails in Algeria in conformity with the following section as translated from the French:—"There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do."

The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract or any part of it is to be governed or applied must be always a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *prima facie* rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord Mansfield, "established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom"—*Robinson*

(14) 37 Law J. Rep. Adm. 33; Law Rep. 2 P.C. 193, 199.

v. *Bland* (6), and see *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (4).

This principle was explained by the Exchequer Chamber in the case of *Lloyd* v. *Guibert* (7) as follows—"It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made, which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract."

It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim as well as the former must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases no doubt where a contract has to be wholly performed abroad the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *prima facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances.

Again it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business convenience and sense to the language of the contract itself with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot therefore be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal.

In the present case the contract was made in London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably therefore we should infer that this was an English contract, and intended to be governed by English law; but it still remains to be considered whether anything in the contract itself or the nature of its stipulations displaces this *prima facie* view either wholly or in part.

Now it cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the appellants that such an intention ought to be inferred from certain provisions as to the collection of the esparto in Algeria and as to its shipment thence. The esparto was to be shipped by the Compagnie Franco-Algérienne or their agents from Arzew or any other port with safe anchorage by sailing ships or steamers during the year 1881. The quality of the esparto was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algérienne at Ain-el-hadjar in Algeria, before being baled, and no claim respecting quality was to be

allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs; otherwise the esparto was to be warehoused by the Compagnie Franco-Algérienne at the plaintiffs' peril and risk. Insurance was to be effected by the defendants for the invoice amount at selling price and two per cent. over in the United Kingdom on the usual conditions. Payment to be made by cash on arrival of the ship or steamer at port of destination. Finally, the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties.

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way or in any part of it to be treated as anything except an English contract, unless it be the mere fact that the esparto is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an Algerian port, after which it is to be at plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element of uncertainty into mercantile contracts. The mere fact that a contract of this description—made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port—is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts.

Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases, as that of common carriers and bailees, of which this is not one) a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by *vis major*. "The rule laid down in the case of *Paradine* v. *Jane* (15) has often," says Lord Ellenborough in the case of *Atkinson* v. *Ritchie* (16), "been recognised in Courts of law as a sound one—that is, that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may—notwithstanding any accident by inevitable necessity: because he might have provided against it by his contract." See also *Spence* v. *Chodwick* (17) and *Lloyd* v. *Guibert* (7). If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an express or implied intention to that effect, be contrary to authority as well as principle—see *Barker* v. *Hodgson* (10) and *Sjoerds* v. *Luscombe* (11).

The Solicitor-General in his argument admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract but governed also the obligations in respect of performance and the liabilities in respect of non-performance of it. It seems to us, however, that the true principles of construction to be applied do not admit of this interpretation of this contract. To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would

(15) Aleyn, 26.
(16) 10 East, 530, 533.
(17) 10 Q.B. Rep. at p. 530; 16 Law J. Rep. Q B. at p. 319.

regulate the method of performance and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further, and to discharge the defendants from performance wherever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made; not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law. If the parties had wished in addition to this to incorporate a provision of French law which in the event of *vis major* would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to shew that in this respect the parties desired the contract to be governed by the French. For these reasons we are of opinion that the judgment of the Court below was right and must be affirmed with costs.

Appeal dismissed.

Solicitors—Conrad J. Davis, for plaintiffs; Nicol, Son & Jones, for defendants.

1883. } GULLY (*appellant*) *v.* SMITH
Dec. 1. } (*respondent*).

Highway — Obstruction — Omission to remove—Highway Act, 1835 (5 & 6 *Will.* 4. *c.* 50), *s.* 72—"*Wilfully Obstruct.*"

[For the report of the above case, see 53 Law J. Rep. M.C. 35.]

[IN THE COURT OF APPEAL.]

1883. }
Nov. 21, 23. } THE OCEAN STEAMSHIP COMPANY *v.* ANDERSON, TRITTON AND COMPANY.*
Dec. 21. }

General Average—Towage Contract binding on Shipowners—Liability of Cargo-owners to Contribution.

The captain of the plaintiffs' ship A., which had run aground on a bank in the river Y. in China, signalled for assistance to the ship S., which belonged to other owners. The assistance was rendered, and both ship and cargo were saved, although with much risk to both ships. At the time when the assistance was rendered there was an agreement in existence amongst the owners of the different ships trading in the river not to render assistance to ships in distress for a less sum than 2,500*l.*, *which was to be paid for services, whether beneficial or not, rendered for a period not exceeding twenty-four hours. The plaintiffs paid that sum to the owners of the S. In an action to recover a general average contribution from the owners of part of the cargo so saved, the jury found that the captain of the ship A. had signalled for assistance, knowing the terms upon which it would be rendered, that he had pursued a reasonable course in so doing, and that, under the circumstances, the sum of* 2,500*l. was a reasonable sum*:—Held, *that the captain of the ship A. had entered into a towage contract which was binding on his owners, and which, under the circumstances, gave rise to a claim for general average contribution, in respect of which the defendants were liable.*

Appeal from a judgment of the Divisional Court.

Action by the owners of the steamship *Achilles* to recover 162*l.* 11*s.* 7*d.*, as a general average contribution from the owners of a portion of the cargo on board that ship in respect of certain services rendered to the *Achilles* by another steamer the *Shanghai*.

The *Achilles*, after having loaded a cargo of tea at Hankow, in China, ran aground upon a bank in the river Yang-tze, and, as

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

both the ship and cargo, which were very valuable, were in great danger, the captain signalled to the *Shanghai* for assistance. The captain of the latter ship came to her assistance, and in the result towed her off, and saved both ship and cargo: the services rendered involving great risk to both ships. The owners of the *Shanghai* then claimed from the owners of the *Achilles* a sum of 2,500*l.* for the services so rendered, upon the ground that there was an arrangement between the owners of the different ships trading in the river Yang-tze, that they would not render any assistance to any vessel in distress except on payment of a sum of 2,500*l.*, and that that sum was to be paid for services rendered to any vessel for a period not exceeding twenty-four hours, whether such services were beneficial or not. The owners of the *Achilles* and of the *Shanghai* were parties to this arrangement, the existence of which was known to the captain of the former ship; but, at the time when he signalled for assistance, and afterwards, the two ships were in such peril that there were no means of communication between them.

The owners of the *Shanghai* claimed the sum of 2,500*l.* for the services rendered, and the owners of the *Achilles* paid that sum. The present action was brought to recover a general average contribution from the defendants, as owners of part of the cargo which was saved.

The defendants paid into Court a smaller sum than that claimed by the plaintiffs.

At the trial before Cave, J., the jury found that the captain of the *Achilles* signalled for assistance, knowing the terms upon which it would be rendered; that he had pursued a reasonable course in so doing; and that the sum of 2,500*l.* was, under the circumstances, a reasonable sum. Cave, J., thereupon directed judgment to be entered for the plaintiffs.

The Divisional Court (Grove, J., Lopes, J., and Mathew, J.,) directed the judgment to be entered for the defendants.

The plaintiffs appealed.

H. Matthews, Q.C., G. Bruce and *H. D Greene*, for the plaintiffs.

Cohen, Q.C., and *Gorell Barnes*, for the defendants.

The following authorities were referred to:—*Kemp* v. *Halliday* (1), *Birkley* v. *Presgrave* (2), *Newman* v. *Walters* (3), *Lowndes on General Average* (4), *The True Blue* (5), *Moran* v. *Jones* (6), *The Pyrenee* (7), *The British Empire* (8), *The Medina* (9), *The Peace* (10), *The E. U.* (11), *Dobson* v. *Wilson* (12), *Aitchison* v. *Lohre* (13) and *M'Andrew* v. *Thatcher* (14).

The following judgments were delivered on Dec. 21:—

BRETT, M.R.—In this case an action was brought by the owners of the ship *Achilles* against the owners of part of the cargo to recover a general average contribution. The case was tried before Cave, J., and a jury, when the following circumstances were proved in evidence. The plaintiffs' ship was lying at Hankow, taking in tea, and when she had taken in her cargo she moved out into the river to proceed to sea, but when turning went aground upon a bank. The ship and cargo were undoubtedly in considerable danger, and the captain thereupon signalled to another ship, which belonged to other owners, to come to his assistance. That ship came to his assistance and towed the plaintiffs' ship off the bank, and thus saved both the ship and cargo.

It was further proved that there was in existence an agreement between the owners of different ships in the river—and between the owners of the two ships in question—that no assistance should be given by one ship to any other ship for a less sum than 2,500*l.* This is undoubtedly a large sum; but the fact of such an agreement having been made is, to my mind, conclusive to shew the unusual

(1) 34 Law J. Rep. Q.B. 233, 242; affirmed 35 Law J. Rep. Q.B. 156; Law Rep. 1 Q.B. 520.
(2) 1 East, 220.
(3) 3 Bos. & P. 612.
(4) 3rd ed., p. 69.
(5) 2 Wm. Rob. 176, 180.
(6) 7 E. & B. 523; 26 Law J. Rep. Q.B. 187.
(7) 1 Br. & Lush. 189.
(8) 6 Jur. 608.
(9) 45 Law J. Rep. P., D. & A. 81; Law Rep. 2 P. D. 5.
(10) Swab. 411.
(11) 1 Spink. 63, 64.
(12) 3 Campb. 480.
(13) 49 Law J. Rep. Q.B. 123; Law Rep. 4 App. Cas. 755.
(14) 3 Wallace, 347 (Amer.).

danger of the river, not only to the ship which runs aground, but also to the ship called upon to give assistance; and I think it is very questionable whether, if we had to decide that point, we could say that it was an unreasonable agreement. But here both captains were aware of the existence of the agreement; for the captain of the plaintiffs' vessel, who signalled for assistance, stated that he knew of its existence, and intended to act upon it, so that the owners of the other ship should be paid according to the agreement. It was also said that the captain of the other ship did not intend that any charge should be made for the assistance rendered, but he certainly did not either say or give any intimation that a charge would not be made. He was the agent of his owners, and had no right to risk their property and put it in a position of considerable jeopardy.

The jury found that there was an agreement to pay this sum of 2,500*l.*, and if I had to decide the question I should have said so also, upon two grounds. In the first place, because it was impossible to say that the captain of the *Shanghai* intended to commit a breach of duty towards his owners; and, secondly, because I do not accept the view which he gave of his own mind, and I apprehend the jury did not believe him; and even supposing that such was his intention, he gave only the smallest intimation, if any, that he was not going to act upon the terms of the agreement. The jury have found there was an agreement to pay this sum, and the captain, moreover, signed the agreement four days afterwards. I entirely agree with the verdict of the jury, and it is clear that there was a contract. A dispute then arose as to the nature of that contract. It was said, on behalf of the plaintiffs, that it was a salvage contract, and that there must be contribution; but, on the other side, it was urged that it was a towage contract, and that there could be no general average contribution. It is clear, however, that the sum of 2,500*l.* was to be paid whether the plaintiffs' ship was towed off the bank or not, and consequently it was a towage contract. The question, therefore, is raised whether general average contribution is payable where a towage contract has been entered into.

The action is brought upon the ground that the owners of the ship have made a general average sacrifice—that is, that they have been put to a general average expenditure. They would not have been put to that expense unless the contract which was made by their captain was binding upon them. If it was not binding, they could not force payment from the defendants of a sum which they were not bound to pay for the assistance rendered to them. The question therefore arises, did the captain of the ship which was assisted make a towage contract which was binding upon his owners? He could not do so unless the circumstances were such as to give him authority to make it, and unless, under the circumstances, it was a reasonable contract, and unless the amount payable was reasonable.

It is not every occasion which authorises a captain to enter into a contract which is binding upon his owners. Both the circumstances under which it is made and also its terms must be reasonable. The questions, whether the circumstances were such as to have entitled the captain to make the contract, and also whether its terms are reasonable, are for the jury. The jury here have found that they were. Taking into account the enormous value of the two vessels, and the great risk incurred, the jury have found that the arrangement which was made was not unreasonable; and I am unable to say that the verdict on that point was wrong. The question then arises, whether a towage agreement, which is made by a captain on behalf of his owners for a large but not unreasonable amount, can give rise to a general average contribution. Wherever, under circumstances of extraordinary danger to both ship and cargo, a voluntary sacrifice is made in order to save both ship and cargo, and both are saved, then the party who makes such a voluntary sacrifice is entitled to call upon the other party whose property has been saved to make a general average contribution. The present case fulfils every part of that proposition, and I am not aware of any decision to the effect that, merely because, under the circumstances of the present case, it is a towage contract, it is not the subject of general average contribution. The contract, therefore, being a towage contract,

entitled the plaintiffs, under the circumstances, to a general average contribution. This point was not taken in the Divisional Court, where it was held that, notwithstanding the verdict of the jury, there was no contract at all, and consequently that the shipowners were not liable to make the payment which they did make. If that were true, the payment would have been a mere voluntary payment, which the plaintiffs would not be entitled to recover from the defendants. I think that the contract was a reasonable contract, and that the plaintiffs are entitled to judgment. The appeal must therefore be allowed.

BAGGALLAY, L.J.—I am of the same opinion. There are four questions to be considered — first, was the agreement entered into in fact; secondly, was it a reasonable course for the captain to pursue to enter into that agreement; thirdly, were the terms of that agreement reasonable; and, fourthly, was the expenditure justified for the purpose of saving the ship and cargo. It appears to me that all these questions should be answered in the affirmative. The first three were substantially so answered by the jury, and I see no reason to dissent from the view which they took. The fourth question appears also to me to have been substantially answered by the findings of the jury, for in point of fact both the ships and cargo were in great danger when the services were rendered by the *Shanghai* at great risk to herself. All the circumstances, therefore, as it seems to me, occurred which would render the expenditure incurred the subject of general average contribution.

BOWEN, L.J.—I am of the same opinion. The first question is, whether a contract was in fact made by the captain of the *Achilles* to pay the sum of 2,500*l*. There was a well known agreement upon the river as to the terms upon which such services would be rendered. The captain of the plaintiffs' ship, at the time when he signalled for assistance, knew that payment would have to be paid for any assistance rendered. It was admitted in the course of the argument that there was no private understanding between the owners of the two vessels that the salvor should render the services gratuitously, and be discharged, so to speak, from the burden of this understanding. But all that could be said as to that argument was that, although every one else knew that the services were to be paid for, yet the captain of the ship which rendered assistance had in his own mind a totally unjustified idea that his owners would not charge for the services. If he had communicated that impression to the captain of the plaintiffs' ship, it might have been said, with some plausibility, that the services had not been rendered upon the terms that they would be paid for. But it seems to me that he concealed what he thought as to the terms which his owners would exact for the services to be rendered to the plaintiffs' ship; the condition of his mind is therefore wholly immaterial.

I think that there was ample evidence for the jury to find that this was a contract; and I also think, for the reasons given by the Master of the Rolls, that this was a towage contract. Did this contract bind the owners of the *Achilles*? It could not affect the owners of the cargo unless it was binding upon the shipowners; but I think the findings of the jury were right, and it is impossible to set them aside. The jury thought that it was not unreasonable that such a contract should be made, although it was a contract for a large sum. I think that the contract bound the owners of the *Achilles*. And I am further of opinion that the contract was a general average expenditure.

It seems to me that there were here all the requisites necessary to constitute a general average act, for there was a voluntary sacrifice; the owners of the cargo are therefore bound to contribute. The judgment of the Divisional Court must therefore be reversed, but upon a point of law which was not argued exhaustively before them, and which was not effectively made in this Court until the reply.

Appeal allowed.

Solicitors — Flux, Son & Co., for plaintiffs; Waltons, Bubb & Walton, for defendants.

[IN THE COURT OF APPEAL.]

1884. } HOUGH *v.* WINDUS AND
Jan. 18, 30. } ANOTHER.*

Judgment Creditor—Writ of Elegit—Effect of Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 146 *and* 169, *on goods seized but not delivered before the* 1*st of January*, 1884.

Section 146 *of the Bankruptcy Act*, 1883, *enacts that "the sheriff shall not, under a writ of elegit, deliver the goods of a debtor, nor shall a writ of elegit extend to goods"; and section* 169 *repeals so much of* 13 *Edw.* 1. *c.* 18 *as relates to the chattels of a debtor, but enacts that the repeal shall not affect anything done or suffered or any right or privilege acquired before the commencement of the Act*:—Held, *that a judgment creditor, who had obtained judgment and sued out a writ of elegit, was entitled to delivery of the goods seized under that writ in December*, 1883, *although the inquisition had not been held and the goods had not been delivered before the* 1*st of January*, 1884, *when the Bankruptcy Act*, 1883, *came into force.*

Appeal from the judgment of the Queen's Bench Division.

The plaintiff Hough obtained in May, 1883, a judgment against Windus for 2,300*l.*; he then sued out a writ of *elegit*, under which the sheriff entered and seized on the 22nd of December, 1883; but no inquisition of a jury to assess the value of the goods was held till after the 1st of January, 1884, when the Bankruptcy Act, 1883, came into operation. The defendant accordingly obtained an injunction preventing the sheriff from continuing the inquisition, and afterwards obtained an order from the Queen's Bench Division directing the sheriff to withdraw from possession.

The plaintiff appealed.

D. Walker, for the plaintiff.—The question is, whether section 146 (1) of the Bankruptcy Act, 1883, affects this case, and prevents the judgment creditor, who obtained judgment and sued out a writ of *elegit* before the Act came into force, from having satisfaction under that writ because the inquisition was not held until after the new Act had come into force.

In this case there is no question of third parties, such as purchasers; the only question is as to the relative rights of the judgment creditor and the judgment debtor. The goods of the judgment debtor are bound from the issue of the writ—*Payne* v. *Drew* (2)—and after the seizure is made the debtor is discharged from the judgment and further execution—*Wilbraham* v. *Snow* (3), *Bacon's Abridgment*, tit. "Execution" (D), p. 397, and *Clarke* v. *Withers* (4). The position of the sheriff is that he can be compelled to make return to the writ, and that if he made a false return he would be liable to an action.

The judgment creditor is a secured creditor, and the office of the jury before whom the inquisition is held is merely ministerial, being confined to the duty of ascertaining the value of the goods seized —*Ex parte Abbott* (5)

Section 146 (1) of the Bankruptcy Act, 1883, alters the law, but the section only applies to the future, and cannot affect writs issued before the Act came into force. If it be thought that the section will not bear this construction, still the judgment creditor is entitled to the fruits of the writ, for the writ was issued and the seizure made before the Act came into force, so that he had done something and acquired a right, under 13 Edw. 1. c. 18, before the commencement of the Act, and he is therefore protected by section 169 (6).

* *Coram* Earl of Selborne, L.C.; Lord Coleridge, C.J.; Brett, M.R.; Cotton, L.J., and Bowen, L.J.

(1) 46 & 47 Vict. c. 52. s. 146, sub-s. 1: "The sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor; nor shall a writ of *elegit* extend to goods." Sub-s. 2: "No writ of *levari facias* shall hereafter be issued in any civil proceeding."

(2) 4 East, 523.

(3) 2 Wms. Saund. 87.

(4) 6 Mod. 293.

(5) 50 Law J. Rep. Chanc. 80; Law Rep. 15 Ch. D. 447.

(6) 46 & 47 Vict. c. 52. s. 169 repeals 13 Edw. 1. c. 18, "in part - namely the words, 'all the chattels of the debtor saving only his oxen and beasts of the plough,'"—and enacts that "the repeal effected by this Act shall not affect—(*a*) anything done or suffered before the commencement of the Act under any enactment repealed by this Act; nor (*b*) any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed."

Wilkinson, for the sheriff, submitted to the judgment of the Court.

H. Reed, for the judgment creditor.—The effect of section 146 (1) is that now a sheriff cannot deliver goods which but for that section he might have delivered. The second part of the clause applies to writs issued before the statute. If the Act had been intended to have a future operation only, the section would have said that the sheriff shall not seize, whereas the words are "shall not deliver." Section 146 (1) is not controlled by the general words in section 169 (6). No right had been acquired in this case before the 1st of January, 1884, for no inquisition had been held, and the sheriff is not bound to seize until after inquisition, for *Ex parte Abbott* (5) only shews that where a sheriff has seized, the creditor acquired a right within section 16 of the Act of 1869.

Semayne's Case (7) and *Towler* v. *Chatterton* (8) were referred to.

Cur. adv. vult.

The following judgments were delivered on January 30:—

THE LORD CHANCELLOR (EARL OF SELBORNE).—In this case a writ of *elegit* was issued at the suit of the appellant, a judgment creditor, for 2,300*l.* against goods of the respondent, under the Statute of Westminster (13 Edw. 1. c. 18), on the 20th of December, 1883. The sheriff took possession on the 22nd of December, 1883. The effect of this proceeding, as the law stood at that time, was to entitle the creditor to delivery of the goods seized, to an amount (to be ascertained by appraisement) sufficient to satisfy his debt. In *Ex parte Abbott* (5) it was determined by the Court of Appeal that, under similar circumstances, the creditor acquired a specific interest, before appraisement, in the goods seized, which a bankruptcy, then intervening, did not defeat. There is in this case no bankruptcy; but it is contended, and it has been decided by the Court below, that the effect of the present Bankruptcy Act (passed on the 25th of August, 1883), which came into operation on the 1st of January, 1884, is to deprive the judgment creditor of the right to the delivery of the goods, given to him by the Statute of Westminster.

In *Ex parte Abbott* (5), Lord Justice James said that this kind of proceeding against goods and chattels, by way of *elegit*, was an absurd anachronism which he hoped to see soon abolished by the Legislature. This has now been done—so far, at all events, as relates to any writ of *elegit* issued after the 31st of December, 1883. But the question is, whether the effect of the statute has also been to intercept from a judgment creditor the fruits of such a writ, previously issued, under which the sheriff was, on that day, lawfully in possession. The Legislature might, if it thought fit, have put an end to that form of process against goods and chattels immediately on the passing of the Bankruptcy Act, and before the time appointed for the commencement of its general operation. But this was not done. It is beyond controversy that a writ of *elegit* might at any time between the 25th of August, 1883, and the 1st of January, 1884, have been issued against goods and chattels, and duly executed by delivery; and that the title of the creditor to the goods so delivered would have been unaffected by the Act. The enactment which is supposed to have had the effect of wholly nullifying the right which the creditor had in this case acquired before the new law came into operation, is contained in the latter of two sections (under the heading "Executions") both independent of bankruptcy. The 146th section is thus expressed—"1. The sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods. 2. No writ of *levari facias* shall hereafter be issued in any civil proceeding." Unless there be anything else in the Act to require a different construction, or some demonstrable repugnancy or inconsistency, I should myself have thought the rule, "*Omnis nova constitutio futuris formam imponere debet et non præteritis*," applicable to an enactment so expressed, applicable (that is) with reference to the day appointed for the Act to commence and come into operation, though later than that on which it received the Royal Assent. The word "hereafter" in the 2nd sub-section means after the commencement of the Act, which speaks

(7) 1 Sm. L.C. (8th ed.) 114.
(8) 6 Bing. 258.

generally from the time of its commencement. If the Legislature had meant to take away rights previously acquired, such an intention (being opposed to the spirit and principle of the presumption expressed in the maxim to which I have referred, and recognised by Sir Edward Coke and other great authorities) might have been expected to be made unequivocally clear, which, to my mind, at least, it certainly is not. According to the ordinary presumption, the words "a writ of *elegit*," as here used, would mean a writ first issued—or, at all events, first made effective—after (and not before) the commencement of the Act.

The latter part of the sub-section "nor shall a writ of *elegit* extend to goods" cannot, in my opinion, without much violence to the natural meaning of the words, receive any other construction. The writ which was issued in the present case, in the usual and prescribed form under and according to the provisions of the Statute of Westminster (then still unrepealed and unaltered), beyond all question did extend to goods in fact and in law. If the Legislature had intended, as from the 31st of December, 1883, to alter the construction as well as to intercept the further execution of such a writ already issued and then in the sheriff's hands, it would surely have found a more appropriate way of expressing that intention than by saying "a writ of *elegit* shall not extend to goods." It has been suggested that these words not only may include, but mean solely and exclusively, a writ of *elegit* issued before the commencement of the Act. Such a construction, as it seems to me, would interpolate a limitation which, if meant, might very easily have been expressed.

I cannot myself doubt that these words do refer to writs of *elegit* to be afterwards issued; and, if so, I think it is a strong reason for construing the same words "a writ of *elegit*," where they first occur in the immediate context of the same sentence, as having the same meaning.

Before I notice the argument mainly relied upon in support of the contrary view, I must advert to one founded on the 2nd sub-section, "No writ of *levari facias* shall hereafter be issued in any civil proceeding." It was inferred from this that the Legislature, when it used the different language of the 1st sub-section, had not in view writs to be hereafter issued. To this argument it is, in my judgment, a sufficient answer that by the 2nd sub-section it was meant to prohibit altogether the issue, after the commencement of the Act, in any civil proceeding of any writ of *levari facias*. By the 1st sub-section it was not contemplated or intended that writs of *elegit* should cease to be issued, but only that their form and effect should be altered. The difference in the language of the two sub-sections (assuming both of them to leave untouched the operation of writs actually issued and effected before the commencement of the Act) is merely such as this difference required, or at least made natural and appropriate. The main argument was that any other construction than that adopted by the Court below would make either the former or the latter part of the 1st sub-section inofficious and superfluous, and would be contrary to the rule: that effect must be given to all the words. After full consideration of this argument, I am unable to agree with it. I see no difficulty here in giving effect to all the words consistently with the appellant's construction, or in placing upon each branch of the sub-section a distinct sense; and although it may be true that what is said either in the first or in the second branch might have been inferred (in point of law) from what is said in the other, I cannot admit that there is any such presumption against fulness, or even superfluity, of expression in statutes or other written instruments as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute or purpose of the instrument is in general to be preferred to that which makes them less so. But for the reasons which I have already given, and others which I shall hereafter add, I find nothing here from which I can infer that it was the policy of this enactment to destroy and nullify rights acquired and already in process of realisation before its commencement. And I adhere to an opinion, expressed by

myself in the House of Lords more than ten years ago, in *Giles* v. *Melson* (9), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, "that nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning only because those words are superfluous." According to my view of the proper and legal meaning of the 2nd sub-section of section 146 of the Bankruptcy Act of 1883, the first part of the sentence, "The sheriff shall not under a writ of *elegit* deliver the goods of a debtor," takes away for the future the remedy against goods by way of *elegit*, given to judgment creditors by the Statute of Westminster, and the subsequent words constituting the second part of the sentence require the form of the writ to be altered for the future in accordance with the change in the law. I cannot accede to the view, that because express words so dealing with the form of the writ may have been inserted *ex abundanti cautela*, and may not have been necessary, the construction which either those or the preceding would have received if they had stood alone ought to be altered.

It is important to bear in mind that delivery by the sheriff is the whole and sole right given to the *elegit* creditor by the Statute of Westminster—all other things which the sheriff has to do under the writ commanding him to make such delivery, entry, seizure and appraisement, being merely preliminary acts, not expressed in the statute or in the writ, but implied from the nature of the duty to be performed.

The words of the statute, to which the 146th section of the New Bankruptcy Act plainly refers:—"When debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages .... that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one-half of his land, until the debt be levied upon a reasonable price or extent."

The Bankruptcy Act, by the words "The sheriff shall not under a writ of *elegit* deliver the goods of a debtor," takes away, as to goods, this whole remedy; and a construction depriving the creditor of his title to delivery, in a case in which the goods were in the hands of the sheriff under an *elegit* duly issued before the 31st of December, 1883, would destroy his whole vested right under the Statute of Westminster, and would, for every practical and substantial purpose, give the enactment, as against him, a retrospective operation. This is not at all like the operation of section 145, which (assuming it to apply to pending execution) only regulates in a just and reasonable manner the exercise of the right, and does not take the right away. I pass from the 146th to the 169th section of the Act, which appears to me to shew positively that the Legislature did not intend to take away, under the circumstances of this case, the creditor's right. That section expressly repeals various enactments to the extent mentioned in the schedule, one of which is the Statute of Westminster the second, chapter 18 "in part—namely, the words, 'all the chattels of the debtor, saving only his oxen and beasts of the plough.'" Those who think it improbable that the Legislature could have devoted more clauses or more words than were necessary to the accomplishment of substantially the same object meet here with an express repeal of those words in the Statute of Westminster which, on any possible construction of the 146th section, except that which would make it throughout and exclusively retrospective, had been altogether deprived of their whole force and effect by section 146. If the principle *ex abundanti cautela* is sufficient, as I think it is, reasonably to explain this much, it is sufficient to explain the addition, in sub-section 1 of section 146, of the words dealing with the form of the writ of *elegit* to the previous words dealing with the substance of the remedy.

It is, therefore, in my opinion, clear that the Legislature has, by this section, thought it right to confirm and corroborate, by way of express repeal of the particular words relating to chattels in the Statute of Westminster, the substance of the enactment contained in sec-

(9) 42 Law J. Rep. C.P. 122; Law Rep. 6 H.L. E. & Ir. App. 24, at p. 33.

tion 146. But that repeal is accompanied by savings, which, if applied to the repealed portion of the Statute of Westminster, expressly preserve the creditor's right in the present case. The material savings are these:—"The repeal effected by this Act shall not affect (*a*) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor (*b*) any right or privilege acquired or duty imposed or liability or disqualification incurred under any enactment so repealed." It is to be observed that these savings apply in terms to the repeal effected by this Act, not specifying that particular section only. Upon that distinction, however, I do not lay stress, because being satisfied that the repealing clause and section 146 ought to be read together, and that the repeal adds nothing to the effect of that section, I am unable to give the saving any narrower construction than it would have had if the repeal, with the saving (so far as relates to the Statute of Westminster), had been added immediately after the words "The sheriff shall not under a writ of *elegit* deliver the goods of a debtor; nor shall a writ of *elegit* extend to goods," in the 146th section itself. It was argued that the savings from a repealing clause would not apply to any express antecedent provision of the Act inconsistent with them—and to this I agree. But the fallacy of that argument (as it seems to me) is this, that it assumes an inconsistency which I do not find to exist. There are no words in section 146 which expressly say, or from which it can (to my mind) reasonably be inferred, that any such rights as are saved by section 169 were intended to be taken away in the particular case of creditors who had obtained writs of *elegit* before the 1st of January, 1884. On the contrary, the general principle expressed in the maxim "*Omnis nova constitutio*," and to which I have already referred, militates against the supposition that the words of section 146, even if they stood alone, ought to have been so construed. I find, then, in section 169 an express enactment that the repeal of the words as to the delivery of chattels in the Statute of Westminster shall not affect any right acquired, or duty imposed, under them. The execution creditor had, under these words of that statute while unrepealed, acquired a right to the delivery of the goods seized; and a duty was imposed by the same words upon the sheriff to deliver them to him. That right and that duty are, in my opinion, expressly preserved; and under these circumstances, much as I regret to find myself differing from Judges for whose opinion I have the very highest respect, I cannot hesitate to say that I think the order appealed from erroneous, and that it ought to be reversed.

LORD COLERIDGE, C.J.—I agree with the judgment of the Lord Chancellor.

BRETT, M.R.—When this case was argued before Lord Justice Bowen and myself, I wished, as the point raised was on a new statute of great interest, and presented no little difficulty, that the case should be argued before a full Court of Appeal. The more I have considered this case the more difficult and doubtful the point appears. I have come to the conclusion, though with great doubt, that the Legislature intended in this case to be verbose and tautologous, and to say the same thing twice over; and therefore the interpretation which has been given to the statute must prevail. I say emphatically that I will not be a party to do away with or weaken an acknowledged rule of construction of statutes, except in extreme cases. I think this is an extreme case. I enter an earnest protest that this mode of drafting Acts of Parliament does not promote clearness; but, for these reasons, I cannot disagree with the judgment which has been read.

BOWEN, L.J.—The question to be decided in the present case is, whether the provisions as to writs of *elegit* of the Bankruptcy Act, 1883, affect a writ which had been issued, and under which the sheriff had seized, before the coming into operation of the Act on the 1st of January, 1884.

Writs of *elegit* had their origin in the year A.D. 1285, under the Statute of Westminster the second, c. 18, by which it was provided that when "debt is recovered

or acknowledged in the King's Court, or damages awarded, it shall be from henceforth at the election of him that sueth for such debt or damages to have a writ of *fieri facias* unto the sheriff, for to levy the debt of the land and goods, or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one-half of his land, until the debt be levied upon a reasonable price or extent."

At common law the writ of *elegit*, like other writs of execution, would probably bind the debtor's goods from the date of its issue; but by the Statute of Frauds (29 Car. 2. c. 3. s. 16) it was provided that no writ of execution should bind the property of the goods but from the time of its delivery to the sheriff. Upon receiving a writ of *elegit*, the sheriff was not in terms commanded by the Statute of Westminster to seize any goods at all, but only to deliver the debtor's goods to the creditor to satisfy the debt; but a direction to deliver implies an authority to seize, and in practice the sheriff's officer begins with a seizure, which is followed by inquisition and perfected by the statutory delivery: for, under the Statute of Westminster the second, there is no sale of the debtor's goods upon an *elegit*, as there is upon a *fieri facias*, but a delivery only. It was held in the Court of Appeal in *Ex parte Abbott* (5), both that a sheriff under a writ of *elegit* is entitled to seize the debtor's goods at once, before the holding of the inquisition, and also that from the time of such seizure the creditor becomes a secured creditor within the meaning of section 16, sub-s. 5, of the Bankruptcy Act, 1869; and it was further decided that a seizure of goods under an *elegit* did not fall within the operation of section 87 of the Bankruptcy Act, 1869. The result of this decision was to leave in writs of *elegit* a means of evading section 87 of that Act.

The costs of the proceedings under an *elegit* were also considerable, while there being no sale, but only a valuation by a jury of the debtor's goods, the justice which was done under this form of writ was more or less rough. Accordingly, in 1880, the late Lord Justice James declared the proceedings against goods and chattels by way of *elegit* to be an absurd anachronism, and expressed a hope that it would forthwith be abolished by the Legislature.

The Bankruptcy Act of 1883 puts an end for the future to the operation of writs of *elegit* so far as goods and chattels are concerned, leaving them still in force as regards the debtor's lands; and the question raised in the present case is, how far the language in which this salutary alteration of the law has been expressed affects the case of writs under which, on the 1st of January, 1884, there has been a seizure but no delivery. The sections of the Bankruptcy Act, 1883, which apply to it are sections 146 and 169, the latter of which repeals the Statute of Westminster the second, c. 18; and, so far as relates to goods, the former of which (section 146) legislates expressly as to what is to be done in respect of goods and chattels under writs of *elegit*, and is as follows: "1. The sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods. 2. No writ of *levari facias* shall hereafter be issued in any civil proceeding."

The first observation to be made upon this section is that the writ of *elegit* is not abolished altogether, like the writ of *levari facias*, but is only restricted in future to lands as distinct from goods and chattels of the debtor.

It is to be remarked, in the second place, that the words of the section, as regards writs of *elegit*, are couched in the very widest form, and in their ordinary signification would comprehend the case not merely of writs issued after the 1st of January, 1884, but also of writs issued before that date, whether seizure had or had not been effected by the sheriff. In spite of this generality of expression, we should be still bound to search for such a construction to be put upon them as would neither prejudicially affect vested rights, nor render abortive the legal effect of things already done; and even if the words stood alone, it would be more in conformity with known canons of interpretation to assume that they were not meant to apply to cases where the sheriff had already seized before the Act came into operation—"*Nova constitutio futuris formam imponere debet non præteritis.*" It is true that the hardship of applying

their operation to cases where there had been a seizure before the 1st of January is considerably diminished by the fact that some months are allowed to elapse between the passing of the Bankruptcy Act, 1883, and its coming into operation —an interval sufficiently long to enable writs in force at the time the Act was passed to work themselves out by delivery. But, nevertheless, a writ of *elegit*, upon seizure under it by the sheriff, has begun at once to operate, and a vested right has been thereby acquired, unless it was the intention of the Legislature to destroy it—see *Williams* v. *Smith* (10). The difficulty, however, in the present instance of placing a restricted construction upon section 146 of the Bankruptcy Act, 1883, so as to respect the rights of a creditor who had already seized between the date of the passing of that Act and of its coming into operation, arises principally from the fact that the subject of writs of *elegit* is again specifically dealt with in section 169. This latter section repeals so much of the Statute of Westminster the second, c. 18, as relates to the debtor's chattels, saving, however, any right or privilege already acquired. It was forcibly argued before us that the effect of this latter section, taken alone, being of itself to prevent goods and chattels being taken in execution under any writ of *elegit* issued after the 1st of January, 1884, it followed, as a matter of reasoning, that the enactment contained in section 146 would have nothing at all upon which to operate, unless it was intended expressly to apply to cases where the execution had begun but had not been perfected by delivery before that date; and the counsel for the respondent urged upon us that it was our duty so to construe the Act as to give effect to the language of section 146, and not to adopt an interpretation which would render section 146 superfluous. It appears to me that the answer to this somewhat formidable argument is to be found in a study of the framework of the Bankruptcy Act, 1883, so far as it works a repeal of previous legislation. It does not seem to me to be possible, without misunderstanding the scheme of drafting which the Legislature had adopted, to treat the repealing section 169 as an independent section, or as one intended to do more than for the sake of symmetry to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. I have examined schedule 5 in detail, which contains the list of previous Acts of Parliament, all or part of which are to be repealed by section 169, and it seems to me that the idea upon which the Bankruptcy Act of 1883 has been framed was to enact, in the first place, specifically a complete code of provisions which, so far as they are inconsistent with any previous legislation, would repeal it by implication; and that then there was a desire to clear the statute-book, so to speak, by section 169, and to sweep into one compendious repeal all the statutes and sections of statutes which, in the earlier part, had been impliedly done away with already—the Bankruptcy Act, 1869, being itself among the number. The mere fact, therefore, that an express repeal of certain provisions as to *elegit* is contained in this general clause would not be any longer an argument for putting on the earlier sections of the Bankruptcy Act, 1883, any construction which they would not independently demand. It seems to me, so far as I have been able to judge, that this observation applies equally to all the Acts and parts of Acts mentioned in schedule 5. The sweeping repeal of each in express terms has already in all cases been preceded in the body of the Bankruptcy Act, 1883, by special enactments as to the individual subject-matter, which would work an implied repeal to the same extent as that afterwards expressly enacted; and I think that the words with which the saving clause in section 169 began—namely, "the repeal effected by this Act shall not affect any right," &c., acquired under any enactment so repealed—are large enough to save vested rights both against the operation of section 169, the general repeal clause itself, and also against that of the previous clauses of the Act. Had, then, any right been here acquired by the creditor before the 1st of January, 1884? It seems to me that the writ of *elegit*, but for the repealing sections of the Bankruptcy Act,

(10) 4 Hurl. & N. 559; 28 Law J. Rep. Exch. 286.

Hough v. *Windus, App.*

would, to use the language of the Court in *Williams* v. *Smith* (10), have then been in operation; and I also think, even without the saving clause of section 169, for the reasons I have already mentioned, section 146, unless it is to receive some special force from the co-existence of another clause, section 169, dealing with the same subject (which, as I have shewn, ought not to be the case), may itself receive a reasonable construction which would exempt from its operation writs under which, prior to the 1st of January, the sheriff had seized. The Statute of Westminster the second only directs that the sheriff shall deliver the goods to the creditor. By implication of law, it has no doubt been held that it is the sheriff's duty previously to seize, and that not only does the writ of *elegit* bind the debtor's good by delivery to the sheriff, but also that upon seizure the creditor becomes a secured creditor and free from the operation of section 87 of the Bankruptcy Act, 1869. Section 146 of the new Bankruptcy Act (not wishing to abolish the writ of *elegit* altogether), first of all, not unnaturally puts an end to the delivery under it of goods and chattels which the Statute of Westminster required; but to prevent any question whether the writ of *elegit*, whose operation was thus mutilated, was still to have any effect whatsoever on the property in the goods and chattels, and to prevent the possibility of a suggestion that the creditor, by the means of the sheriff, might seize and hold possession of, though he could no longer demand a delivery of the goods to himself in satisfaction, added the future provision that the writ of *elegit* should not extend to chattels at all. This would account for the mode in which section 146 is framed, though it is exceedingly probable that the draftsman may have had some further or other reason still which I have not succeeded in discovering. Both the recognised rule that statutes should be interpreted, if possible, so as to respect vested rights, and it may be the effect of the saving clause in section 169 itself, would be to withdraw from the operation of section 146 all writs which, like the present, were already in force and vigour prior to the 1st of January, 1884.

For these reasons, then, although I do not think the matter perfectly free from doubt, I have arrived at the conclusion that the judgment of the Queen's Bench Division should be reversed.

Lord Justice Cotton desires me to say that he agrees, with the rest of the Court, that the judgment appealed from must be reversed; but that he should have been unable to arrive at this conclusion if the question had turned simply on the true construction of sections 146 and 169 alone. In that case, as section 169, by repealing a portion of the Statute of Westminster, prevents any writ of *elegit* issued after the Act came into operation from affecting or extending to chattels, and no writ so issued would authorise the sheriff to deliver the goods of a debtor, he would have been unable to concur in a construction of section 146 which confines its effect to writs issued after the Bankruptcy Act came into operation. But in the instances where portions of Acts of Parliament are repealed by the 169th section, he finds that there are in the previous sections of the Act enactments which, in effect, repeal portions of statutes in terms repealed by section 169; and he therefore comes to the conclusion that the frame of the Bankruptcy Act, 1883, is first to enact provisions which in effect, though not in terms, repeal those of earlier statutes, and then, either *ex abundanti cautela*, or to clear the statute-book, to repeal in terms the portions of Acts which have been in effect, though not in terms, already repealed.

Appeal allowed.

Solicitors—Lyne & Holman, for plaintiff; Ingledew, Ince & Co., for defendant; Maynard, for the sheriff.

1883. Dec. 12.

COX *v.* ANDREWS.

Gaming and Wagering—The Betting Houses Act (1853) *Amendment Act*, 1874 (37 *Vict. c.* 15)—16 *&* 17 *Vict. c.* 119.

[For the report of the above case, see 53 Law J. Rep. M.C. 34.]

[IN THE COURT OF APPEAL.]

1884. Jan. 30, 31. } GULLICHSEN *v.* STEWART BROTHERS.*

Charter-party—Bill of Lading—Incorporation of Terms of Charter-party—Cesser Clause—Demurrage—Port of Discharge.

Goods were shipped on board the plaintiff's ship under two bills of lading, by which they were made deliverable at the port of discharge to the defendants or their assigns, "they paying freight and all other conditions as per charter-party." The charter-party, which was entered into by the defendants as charterers for account of another party, stipulated for payment of freight and demurrage, and also that the liability of the defendants as charterers should cease as soon as the cargo was on board, the vessel holding a lien upon the cargo for freight and demurrage. In an action against the defendants, as consignees of the goods, for demurrage incurred at the port of discharge,—Held, *that as the cesser clause in the charter-party was inconsistent with the contract contained in the bill of lading, it could not be incorporated into the bill of lading, and, consequently, that the defendants as consignees were not absolved from liability for demurrage incurred at the port of discharge.*

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 648) *affirmed.*

Appeal from a judgment of the Queen's Bench Division on a Special Case (reported 52 Law J. Rep. Q.B. 648).

The facts, briefly stated, are as follow:—

A charter-party made between the plaintiff and the defendants, as charterers for account of another party, stipulated for the payment of freight and demurrage, and also that the defendants' liability as charterers should cease "as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." Goods were shipped by the charterers at the port of loading in two lots, and two bills of lading were given by which the goods were made deliverable at the port of discharge to the defendants or their assigns, "they paying freight and all other conditions as per charter-party."

The plaintiff, as shipowner, made a claim for demurrage against the defendants, as consignees of the goods, for delay at the port of discharge.

The Queen's Bench Division (Pollock, B., and Lopes, J.) held that the cesser clause contained in the charter-party applied to demurrage at the port of loading, but did not absolve the defendants, as consignees, from liability at the port of discharge; and that only such conditions in the charter-party were incorporated into the bill of lading as were not inconsistent with the other terms of the bill of lading.

The defendants appealed.

Edwyn Jones, for the defendants.—The liability of the charterers to pay demurrage imposed by the charter-party ceased by virtue of the cesser clause when the goods were placed on board at the port of loading. The obligations imposed on the consignees were the same as those imposed upon the charterers by virtue of the words of the bill of lading, the defendants or their assigns "paying freight and all other conditions as per charter-party." There is a specific promise to pay freight, but the promise to pay demurrage is not incorporated in the bill of lading. A remedy also is given to the shipowner by the clause in the charter-party that the vessel shall hold a lien upon the cargo for freight and demurrage. *Porteous* v. *Watney* (1), *Gray* v. *Carr* (2) and *Sanguinetti* v. *The Pacific Steam Navigation Company* (3) were cited.

Synnott (with him *French*), for the plaintiff, was not called upon to argue.

LORD COLERIDGE, C.J.—I think that this case is perfectly clear when the document upon which the action is brought is considered. The bill of lading contains an express stipulation—the defendants or their assigns "paying freight and all other conditions as per charter-party." There

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

(1) 47 Law J. Rep. Q.B. 365; Law Rep. 3 Q.B. D. 534, 541.

(2) 40 Law J. Rep. Q.B. 257; Law Rep. 6 Q.B. 522.

(3) 46 Law J. Rep. Q.B. 105; Law Rep. 2 Q.B. D. 238.

is therefore an express contract that the stipulations contained in the charter-party as to the payment of freight and demurrage are to be incorporated in the bill of lading and bind the consignees as if the important words contained in the charter-party which relate to this had been written into the bill of lading. Then it was said that there is a condition in the charter-party which provides for a cesser of the liability of the charterers at a particular moment—namely, "as soon as the cargo is on board"; and that this cesser clause must also be taken to be incorporated in the bill of lading by the words to which I have referred; and it was also said that the charterers in this case and the consignees are the same persons, and therefore that their liability also ceased by virtue of the cesser clause as soon as the vessel was loaded. It is true that the charter-party does contain such a cesser clause, and that the charterers and consignees are the same persons; but one cannot incorporate, by these words, into the bill of lading such of the conditions contained in the charter-party as are inconsistent with the bill of lading. Such portions only of the charter-party as are consistent with the bill of lading are to be incorporated into it. The two contracts are separate. The cesser clause in the charter-party is inconsistent with the contract contained in the bill of lading; and where, therefore, there is an express contract in the charter-party which provides for this payment; it is impossible to incorporate into the bill of lading, which refers to the charter-party, an inconsistent clause which provides for the ceasing of that liability. I think that the judgment of the Court below was correct, and should be affirmed.

BRETT, M.R.—In this case the charter-party was signed by the defendants as charterers, and possibly it was signed by them so as to make them liable upon it if there had been no cesser clause contained in it. But inasmuch as they were only agents for other parties, a clause was inserted that their liability should cease as soon as the cargo was on board. If the charterers had done nothing more, their liability would have ceased, according to the terms of the cesser clause, as soon as the ship was loaded. But they did do something more; for, the goods being shipped, they took two bills of lading, by the terms of which the goods were to be delivered at the port of discharge to the defendants or their assigns. The contract upon the bill of lading is distinct from the contract upon the charter-party; for under the bill of lading the defendants contract, not as charterers, but as shippers; and they are sued upon the contract contained in the bill of lading to pay freight and demurrage, which contract is incorporated into the bill of lading from the charter-party. We must therefore only look at the contract contained in the bill of lading. Even if every word in the charter-party which ought to have been incorporated into the bill of lading had been written into it, it would be absurd to suppose that the cesser clause could possibly be written into the bill of lading, for that would make every part of the contract contained in the bill of lading cease the moment the bill of lading was given. That would be an absolute contradiction, and shews that it never was intended that it should be written into it. So much only of the contract contained in the charter-party must be written into the bill of lading as is consistent with the contract contained in the bill of lading. The charter-party contains a contract for the payment of freight and demurrage which is not inconsistent with the contract contained in the bill of lading, and which must therefore be read into it, by virtue of the words in the bill of lading which incorporate the charter-party. The defendants are therefore liable upon the contract in the bill of lading, which is wholly independent of the charter-party except as regards the conditions contained in it, which are not inconsistent with those contained in the bill of lading. The decision of the Court below was right, and must be affirmed.

BOWEN, L.J.—I also think that this case is perfectly clear. The contract to be construed is the contract contained in the bill of lading. That document provides that the goods are to be delivered at the port of discharge to the defendants or their assigns, "they paying freight and all other conditions as per charter-party." That

seems to me to incorporate, to some extent, the conditions in the charter-party; but it only incorporates into the bill of lading those conditions which do not destroy the bill of lading. Thus it incorporates the clause as to payment of freight and demurrage; but it does not incorporate the cesser clause, for that would make the whole of the contract contained in the bill of lading useless.

Appeal dismissed.

Solicitors –F. Venn & Co., agents for Collins, Robinson & Co., Liverpool, for plaintiff; Kearsey, Son & Hawes, for defendants.

1883. Dec. 17. } MELVILLE *v.* STRINGER. HOUGHTON AND OTHERS (*claimants*).

Bill of Sale—Form of—Payment "on Demand" — Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.*), *c.* 43. *s.* 7, *sub-s.* 1, *and s.* 9.

A bill of sale was given to secure payment of several sums of money due to, and advanced by, four sets of mortgagees, and contained a separate covenant with each set of mortgagees to pay on demand the sums due to each, with a declaration that if default should be made in payment it should be lawful for the mortgagees to enter, seize and sell the property:—Held, *that this form of bill of sale did not contravene the provisions of the Bills of Sale Act* (1878) *Amendment Act*, 1882.

This was an appeal, by Special Case, from the decision of the learned Judge of the County Court of Lancashire, holden at Wigan, that the bill of sale hereinafter described was in accordance with the Bills of Sale Act (1878) Amendment Act, 1882.

On the 18th of June, 1883, the plaintiff, George Clough Melville, recovered judgment for 7*l.* 15*s.* debt and 2*l.* 6*s.* costs, in the Salford Hundred Court of Record, against the defendant, John Henry Stringer, and on the 12th of July, 1883, execution was issued, and certain goods, chattels and stock-in-trade comprised in the bill of sale were seized by the high bailiff. An interpleader summons was granted on the 17th of August, 1883, and the issue was tried by the learned Judge of the County Court of Lancashire, holden at Wigan, on the 29th of August, 1883.

At the hearing the claimants set up their title to the goods, chattels and stock-in-trade under and by virtue of a certain document, purporting to be a bill of sale, dated the 1st of June, 1883, and made between the execution debtor of the first part, Edward Pierce Houghton and Job Hallmark of the second part, Job Hallmark and James Smith of the third part, and Edward Pierce Houghton, Job Hallmark, James Smith and James Edwardson (in the bill of sale called the mortgagees) of the fourth part.

To secure the payment of the sum of 387*l.* 0*s.* 3*d.* to Houghton and Hallmark, of the sum of 97*l.* 4*s.* 4*d.* to James Edwardson, and the repayment of any sum or sums of money which the said Job Hallmark and James Smith, or either of them, might thereafter be called upon to pay in respect of a promissory note signed by Hallmark, Smith and the judgment debtor, and also of the sum of 150*l.* to Houghton, Hallmark, Edwardson and Smith, the execution debtor (in the bill of sale called the mortgagor) assigned to the mortgagees his goodwill and interest in the business of a licensed victualler and hotel keeper at the Eagle and Child and Royal Hotel, and every subsidiary trade or trades, business or businesses carried on at the same premises in connection with his business as a licensed victualler and hotel keeper, and the wine and spirit licences belonging to the said hotel, and all the trade fixtures, plant, furniture, stock-in-trade, chattels and things specifically described in a schedule to the said bill of sale, and also all the fixtures, plant, chattels and things which at any time during the continuance of the security should be used in or brought upon the said Eagle and Child and Royal Hotel in substitution for or in addition to any chattels or things specifically described in the schedule.

The mortgagor then covenanted that he would pay Houghton and Hallmark, on demand, 294*l.* 4*s.* 10*d.*, and on the 8th of

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July 92*l.* 15*s.* 5*d.*, with five per cent. interest on both sums, and that he would pay Hallmark and Smith, on demand, such sum or sums as they, or either of them, might thereafter be called upon to pay in respect of the promissory note, together with five per cent. interest, and that he would pay Edwardson, on demand, 97*l.* 4*s.* 4*d.*, with five per cent. interest, and also that he would pay the mortgagees, on the 1st of July next, 150*l.*, with five per cent. interest. The mortgagor further covenanted, amongst other things, to insure and produce to the mortgagees, or any of them, on demand, the policy of insurance on the aforesaid goods and the receipt for any premium payable in respect of it; and it was in the bill of sale declared that, if default should be made in payment of any sum or sums of money thereby secured, or the interest thereof, at the times at which the same were covenanted to be paid, or if any other default or event mentioned as a cause of seizure in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882, should be made, then, but not otherwise, the mortgagees might enter and seize the said chattels and things.

It was contended that the bill of sale was not a bill of sale made in accordance with the form given in the schedule to the Bills of Sale Act, 1882, and consequently that it was void against the execution creditor.

The Judge gave a verdict for the claimants, but gave the execution creditor leave to appeal.

The questions for the Court were whether the bill of sale was in accordance with the Bills of Sale Act (1878) Amendment Act, 1882; and, if not in accordance therewith, whether it was void against the execution creditor.

Ambrose, Q.C. (with him *Woodard*).—This bill of sale does not accord with the form required by section 9 of the Act of 1882 (1)—*Davies* v. *Burton* (2). There are four mortgagees who have no common interest. There is no "time of payment specified" as required by the Act, as in this bill of sale payment is to be "on demand." The power of sale is not given in the statutory form.

French.—The power of sale is similar to the form of power of sale under the Conveyancing Act, 1881, s. 19. Power of sale is given by the Bills of Sale Act, 1882, s. 7, sub-s. 1 (1), but there may be other circumstances which it is the wish of the parties to include as a ground of entry, and the Legislature did not intend to lay a trap for bills of sale holders, but intended any *bona fide* instrument to be valid. This covenant for right of re-entry

(1) 45 & 46 Vict. c. 43. s. 7. sub-s. 1: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security."

Section 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form in the schedule is as follows:—

"Form of Bill of Sale.

"This indenture, made the day of , between A B, of , of the one part, and C D, of , of the other part, witnesseth that, in consideration of the sum of £ now paid to A B by C D, the receipt whereof the said A B hereby acknowledges [*or whatever else the consideration may be*], he the said A B doth hereby assign unto C D, his executors, administrators and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A B doth further agree and declare that he will duly pay to the said C D the principal sum aforesaid, together with the interest then due, by equal payments of £ , on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A B doth also agree with the said C D that he will [*here insert terms as to insurance, payment of rent or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

"Provided always that the chattels hereby assigned shall not be liable to seizure or taken possession of by the said C D for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

"In witness whereof, &c.

"Signed and sealed, &c."

(2) 52 Law J. Rep. Q.B. 334, 636; Law Rep. 10 Q.B. D. 414.

is only a covenant to maintain the security. If four deeds had been executed the same result might have been attained. All the four are interested in the security and in maintaining it, and this was a scheme devised to effect that.

Ambrose, Q.C., in reply.—A proviso that, in case of any one not a party to the bill of sale attempting to take the property in execution, it should be deemed a default on which the mortgagees might seize, would do; but not, as here, a proviso that, on default as to one of the mortgagees, the others may sue.

MATHEW, J.—I think the County Court Judge's decision must be confirmed. There has not been in this case a departure from the Act, or any violation of the provisions of section 9. When the deed is looked at it appears that the maker of it was indebted to various persons in relation to different transactions, and, for the purpose of securing those persons, had executed the deed wherein he covenanted to pay certain sums to one or more of them on demand, and others on stated days, and that, in the event of default by him as to any one of the payments, all the other persons should have a right to seize the property mortgaged. It is said that this is not such a payment as is contemplated by the Act, and that the printed form in the schedule thereto contemplates only a payment on a certain day. But, in my judgment, the forms in italics shew that any form of words as regards the arrangement for the repayment may be used, and the italicised words in the form are only used by way of example. Section 7 of the Act shews that a bill of sale may contain a covenant necessary for maintaining the security, and allows the goods to be seized on default in the performance of such a covenant. I think this appeal must be dismissed.

DAY, J.—I concur.

SMITH, J.—I think this is clearly a covenant necessary for maintaining the security which might be inserted.

Appeal dismissed, with costs.

Solicitors—James Clement, Manchester, for appellants; Last & Son, agents for Barrell, Rodway & Barrell, Liverpool, for respondents.

1883. Nov. 26. } DRUITT v. THE OVERSEERS OF CHRISTCHURCH.

Parliament—County Vote—Forty-shilling Freeholds—"Actual bona fide occupation"—2 Will. 4. c. 45. ss. 18 and 26—8 Hen. 6. c. 7.

Rent-charges for life or lives below the annual value of 5l., requiring "actual and bona fide occupation" under section 18 of the Reform Act, 1832, do not qualify for a vote at county elections, being incapable of such occupation.

Case stated by a Revising Barrister on his retaining the names of Arthur W. Lane and Ernest L. Lane on the list of Parliamentary voters for the southern division of the county of Southampton.

Arthur W. Lane and Ernest L. Lane were each entitled, under two deeds of the 1st of December, 1881, to the yearly rent-charge of 2*l.* charged upon a freehold messuage during the life of the grantor, free of all deductions and charges.

Objection was made that they were seised of an estate for lives of rent-charges under the value of 5*l.* per annum, that such rent-charges were incapable of actual and *bona fide* occupation, and that they came within the disability of 2 Will. 4. c. 45. s. 18.

The Revising Barrister held that the right to the rent-charge, and the payment thereof before the 1st of January, 1883, constituted an occupation of the rent-charge, and retained the names.

Bosanquet, Q.C., for the appellant.—By 8 Hen. 6. c. 7, the right to vote in counties was restricted to such as "had free land or tenement to the value of 40*s.* by the year at the least above all charges." Residence within the county was also required, but this requisite was repealed by 14 Geo. 3. c. 58. A forty-shilling freehold rent-charge conferred a vote under this section; but by section 18 of the Reform Act, 1832 (2 Will. 4. c. 45), it is provided that no person shall be entitled to vote at county elections "in respect of any freehold lands or tenements whereof such person may be seised for his own life or for the life of another, or for any lives whatsoever, except such person shall be in

the actual and *bona fide* occupation of such lands or tenements, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges," with other exceptions. By the Representation of the People Act, 1867, the 10*l.* was reduced to 5*l.* By section 26 of the Reform Act, 1832, the voter must have been in the actual possession of his estate of interest, or in the receipt of the rents and profits thereof, for six calendar months previous to the last day of July. Occupation and possession are thus contrasted, and there has been in this case only the latter, not the former. The point was referred to in *Bearn* v. *Watson* (1), but not decided. He also cited *Warburton* v. *The Overseers of Denton* (2).

B. Coleridge.—There has been actual occupation, so far as a rent-charge can be actually occupied. He cited *Murray* v. *Thorniley* (3) and *Dodds* v. *Thompson* (4).

LORD COLERIDGE, C.J.—We have to put a construction upon section 18 of the Reform Act, 1832, with regard to votes in counties in respect of a freehold of a less yearly value than 10*l.*, subsequently reduced to 5*l.* The question is whether a rent-charge for the voter's own life or *pur autre vie* must not be for 5*l.* at least. I am of opinion that it must. The old statute limiting the franchise in the time of Hen. 6 uses the word "have," which has been decided to include rent-charges issuing out of land. Nothing has been done to alter the statute of Hen. 6 as to rent-charges in fee. They remain as they were; but the statute of Will. 4 placed a limitation on rent-charges for life, and enacted that no one should have a vote for freeholds for life, including rent-charges, "except such person shall be in the actual and *bona fide* occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage settlement, devise or promotion to any benefice, or to any office, or except the same shall be of the clear yearly value of not less than 10*l.*" —now 5*l.* The grant of a freehold for life or lives is not to confer a vote unless it is of 5*l.* yearly value, or within the other exceptions. The object was to limit the creation of faggot votes. It is one thing to create rent-charges of 40*s.*, and another thing to create rent-charges of 5*l.* The case is not without authority. In the case of *Bearn* v. *Watson* (1)—before my brother Denman and my brother Bowen—the Court held the rent-charge, when apportioned between the two counties, to be insufficient, it being above 40*s.*, but below 5*l.* The other cases cited are not in point. The two sections 18 and 26 of the Reform Act can be read together. In all cases there must be possession under section 26; and in cases of freeholds for life below the value of 5*l.*, including rent-charges, there must be occupation. As there cannot be occupation of a rent-charge, rent-charges for life below 5*l.* do not give a vote.

HAWKINS, J., and MATHEW, J., concurred.

Decision affirmed.

(1) 1 Colt. Reg. Cas. 268.
(2) 40 Law J. Rep. C.P. 49; Law Rep. 6 C.P. 267.
(3) 2 Com. B. Rep. 217; 15 Law J. Rep. C.P. 155.
(4) 35 Law J. Rep. C.P. 97; Law Rep. 1 C.P. 133.

Solicitors—Lovell, Son & Pitfield, agents for Druitt & Druitt, Christchurch, for appellant; Robins & Cameron, agents for Robins & Sons, Southampton, for respondent.

[IN THE COURT OF APPEAL.]

1883. Nov. 9. THE MAYOR AND CORPORATION OF PETERBOROUGH (*appellants*) *v.* THE PARISH OF WILSTHORPE AND THE ASSESSMENT COMMITTEE OF THE STAMFORD UNION.

Practice—Court of Appeal—Jurisdiction to entertain Appeal—Case stated for Opinion of Queen's Bench Division—Baines's Act, 12 & 13 *Vict. c.* 45. *s.* 11—*Poor Rate—Interlocutory Appeal—Judicature Act*, 1873, *s.* 19.

[For the report of the above case, see 53 Law J. Rep. M.C. 33.]

1883. Nov. 26. } GREENWAY *v.* BATCHELOR. JACOB'S CASE.

Parliament — Municipal Vote — Divisions 1 *and* 3*—Objection—Transfer from one Division to the other—*41 *&* 42 *Vict. c.* 26, *sections* 15 *and* 28.

In the revision of lists made out in divisions under section 16 *of the Parliamentary and Municipal Registration Act,* 1878, *where objection is made to the Parliamentary qualification of a person placed in division* 1*—containing both Parliamentary and municipal voters—and that objection is sustained, and no proof is produced of a municipal qualification, "the result of the revision," under section* 28, *sub-s.* 15, *is that the person in question has no right on the list at all, and the Barrister is not bound to place him in division* 3, *containing persons having the municipal qualification only.*

Case stated by a Revising Barrister upon his striking out the name of Abraham Jacobs both from the municipal and Parliamentary lists.

The written objection was in the following terms:—

"I hereby give you notice that I object to your name being retained on Division one of the list No. 1 for the parish of St. Andrew of persons entitled to vote at the election of members to serve in Parliament for the Parliamentary borough of Plymouth, on the following grounds: 1. That you have not occupied for twelve months to July 15 the qualifying property. 2. That your occupation is not sufficient or of a nature to create a qualification for the Parliamentary franchise. 3. That the premises occupied by you are not of sufficient value. 4. That the premises so occupied do not confer a right to vote. 5. That the nature of your qualification is wrongly described."

The notice was signed by Richard Lewis, described as "on the list of Parliamentary voters," but, in fact, on that list and on the municipal list.

It was admitted that Jacobs had no sufficient qualification for the Parliamentary franchise. The Revising Barrister was asked to transfer the name from division 1, which contains the names of persons entitled to the Parliamentary and municipal votes, to division 3, which contains the names of municipal voters only. The Revising Barrister required proof of a qualification entitling Jacobs to be registered on division 3. In default of such evidence the name was struck off the lists altogether.

R. S. Wright, for the appellant.—The voter's name is entered by the overseer in one of these divisions under section 16 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), as a matter of convenience. He is entered in division 1 to save writing his name twice over in divisions 2 and 3; but he is only objected to as a Parliamentary voter. That objection was sustained, but the Revising Barrister was wrong in striking the name out altogether, because he is bound, by section 28, sub-section 15, to place the name "in the division in which it should appear according to the result of the revision." The result of the revision is that the voter is a municipal but not a Parliamentary voter, because an objection was taken to him as a Parliamentary voter, and sustained; but he has not been objected to as a municipal voter.

B. Coleridge, for the respondent, was not called on.

LORD COLERIDGE, C.J.—The question in this case is whether the Revising Barrister was bound to transfer the voter's name from division 1 to division 3. The effect of the Act can hardly be, that whenever there is a fatal objection to a person on a list, the Barrister is bound, without any evidence of qualification, to transfer him to another list. It is rather that the claimant must make himself safe and put himself on the right list. His claim in this case appeared on division 1. The objector objected to him on division 1, and it is admitted that he was properly struck off. The Revising Barrister then said that he had power to put the voter on division 3 if it turned out that he was entitled to be there, but required proof of his right to be there. The claimant declined this offer, so that his name was struck off altogether. It is clear that the Revising Barrister exercised a wise discretion. When Mr.

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Wright argues that the man must be put on division 3 without proof of qualification, he brings forward an argument which cannot convince us.

HAWKINS, J.—I am of the same opinion.

MATHEW, J.—Sub-section 15 of section 28 is clearly decisive of the matter. The Revising Barrister is bound to place the name of the person in the division in which it should appear, according to the result of the revision. The objection was fatal to keeping the name on the list. The Revising Barrister has power to correct any mistake, but it cannot be said that he is bound to put the claimant on the list.

Decision affirmed.

Solicitors—Pattison, Wigg & Co., agents for John Greenway, Plymouth, for appellant; J. E. Fox & Co., agents for R. L. Batchelor, Plymouth, for respondent.

1883. Nov. 26.

GREENWAY *v.* BATCHELOR. ALDRIDGE'S CASE.

Municipal Corporations—Burgess Qualification—Occupation of Part of a House—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9 *and* 31—*Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.

By the operation of the Municipal Corporations Act, 1882, *the municipal franchise in respect to parts of a house is assimilated to the Parliamentary franchise, and the sole and exclusive occupation of part of a house gives a municipal qualification, although the part is not occupied for business purposes, as required by the Registration Act*, 1878.

Case stated by a Revising Barrister on his retaining the name of Charles Aldridge on division 1 of the list of Parliamentary and municipal voters, objected to in respect of his municipal qualification.

Charles Aldridge occupied, for the purposes of a private dwelling only, two rooms at No. 9 Batten Street, Plymouth, in which house there were four other residents. The landlord did not live on the premises.

It was contended on behalf of the appellant that Aldridge, occupying only a part of a house as a dwelling-house, and not for the purpose of any trade, business or profession, had no such qualification as a householder as to render him liable to be rated, and that consequently such occupation would not qualify him for a municipal vote; and, further, that rooms so occupied did not constitute a house so as to create a municipal qualification.

The Revising Barrister held that Aldridge was entitled to the municipal as well as the Parliamentary franchise.

The question stated for the Court, in addition to another question not argued, was, whether a person in Aldridge's position, occupying only a portion of a house as a private dwelling, was such a householder as could claim the municipal franchise.

R. S. Wright, for the appellant.—The municipal qualification is conferred by section 9 of the Municipal Corporations Act, 1882. Qualification (*b*) requires that the voter "is, on the 15th of July in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint or several, of any house, warehouse, counting-house, shop or other building, in the borough." By section 31 "(*a*), the terms house, warehouse, counting-house, shop or other building include any part of a house where that part is separately occupied for the purposes of any trade, business or profession; and . . . . (*b*) where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." The result is that the qualification is given by a whole house and by a part of a house, if that part is separately occupied for business purposes; and by sub-section (*b*), the part of the house is not the less separately occupied because the occupier jointly occupies another part. The qualification for the Parliamentary vote is different, as by 41 & 42 Vict. c. 26. s. 5, "a part of a house separately occupied as a dwelling" gives a qualification for that vote; and with regard to the municipal

vote, the same words were used as in the Municipal Corporations Act, 1882, and clause (*b*) in the latter Act is reproduced from section 5 of 41 & 42 Vict. c. 26. s. 5.

B. Coleridge, for the respondent, was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that the Revising Barrister is right, and that the decision must be affirmed. I should have agreed with the argument which has been addressed to us, if the case had rested only on the words used in the Registration Act, 1878. But sub-section (*b*) of section 31 of the Municipal Corporations Act, 1882, seems to me to have put the point beyond all reasonable doubt, and to bring the municipal franchise, in respect of the sole and exclusive use of a part of a house, into the same position as the Parliamentary franchise.

HAWKINS, J., concurred.

MATHEW, J.—It must not be supposed, in my opinion, that before the Municipal Corporations Act of 1882 the occupation of a separate portion of a house separately rateable would not confer the municipal franchise. The Municipal Corporations Act of 1882 has, however, put the matter beyond reasonable doubt.

Decision affirmed.

Solicitors—Pattison, Wigg & Co., agents for John Greenway, Plymouth, for appellant; J. E. Fox & Co., agents for R. L. Batchelor, Plymouth, for respondent.

1883. Nov. 27. } HARRIS (*appellant*) *v.* MAY (*respondent*).

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Seller having purchased with "Written Warranty"—Running Contract.*

[For the report of the above case, see 53 Law J. Rep. M.C. 39.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. Nov. 7. Dec. 10. 1884. Jan. 28. Feb. 5. } PIERSON *v.* THE KNUTSFORD ESTATE COMPANY.*

Solicitor—Charging Order—"Money Preserved"—Money paid into Bankruptcy Court to abide result of a Counter-claim— 23 & 24 *Vict. c.* 127. *s.* 28.

In an action in the High Court the defendant counter-claimed for money due from the plaintiff, and also took proceedings in bankruptcy against the plaintiff. The bankruptcy proceedings were stayed, on payment of 300*l. into the Bankruptcy Court to abide the result of the action. The action and all matters in dispute were referred, and an award made in the plaintiff's favour. The plaintiff's solicitor applied for a charging order on the* 300*l. for his costs. The Divisional Court declined to make the order, on the ground that it had no power to do so, and also that no sufficient merit had been shewn.*

Semble, *per* GROVE, J.,—*That the charge, if made, would take priority over a mortgage, although such mortgage had been made with the cognisance of the solicitor to prevent his client becoming bankrupt.*

Held (*by the Court of Appeal*), *that the money was not "property preserved" within the meaning of section* 28 *of* 23 & 24 *Vict. c.* 127, *inasmuch as the right to it depended on the discretion of the Bankruptcy Court, which might be affected by circumstances outside the litigation.*

Motion to reverse an order of Butt, J., of the 25th of September, refusing to make a charging order under section 28 of the Solicitors Act, 1860, in favour of Messrs. Price, Woodcock & Co., the plaintiff's solicitors.

In July, 1882, the plaintiff sued the defendant company for an alleged debt of 727*l.* In March, 1883, one Carlton was joined as defendant, who thereupon presented a petition in the Bankruptcy Court at Manchester to make the plaintiff a

* *Coram* Brett, M.R., and Bowen, L.J.

bankrupt in respect of a sum of more than 600*l.* alleged to be due to him from the plaintiff for rent.

On the 20th of April, 1883, Carlton delivered a counter-claim in respect of the above-mentioned sum. On the 30th of April, the petition came on for hearing, and was adjourned generally, upon payment into the Bankruptcy Court of 300*l.* to abide the further order of that Court after the determination of the action between the plaintiff and Carlton.

At the trial, the action and all matters in dispute were referred by consent to an arbitrator to say what should be done with the sum of 300*l.* The arbitrator dealt with all the issues, and on the 28th of July made his award in favour of the plaintiff for 157*l.*, finding that nothing was due from the plaintiff to Carlton at the time when the petition was presented: and he gave judgment for the plaintiff on the counter-claim, and directed the sum of 300*l.* to be paid to him.

On the 13th of August, 1883, the petition was dismissed with costs. Previously, on the 20th of June, 1883, by a deed purporting to be made between the plaintiff and Carlton, and Cunliffe, Brooks & Co., but executed by the plaintiff, and not by Carlton, the plaintiff mortgaged the 300*l.* in Court to Cunliffe, Brooks & Co.

Horne Payne, for the applicants.

Shiress Will, for the defendants.

The arguments sufficiently appear from the judgment of Grove, J.

The judgment of the Court (1) was delivered (on Dec. 10) by

GROVE, J.—This was an application for a charging order in favour of a solicitor under 23 & 24 Vict. c. 127. s. 28.

The applicant was solicitor to the plaintiff, who brought an action against the defendants and their manager Carlton (who counter-claimed) in the High Court, which cause, with all matters in dispute, was referred, and ultimately there was an award in the plaintiff's favour for 157*l.* Carlton took proceedings in bankruptcy against the plaintiff in respect of the same as was set up in the counter-claim, and a sum of 300*l.* was paid by the plaintiff into the Court of Bankruptcy to abide the result. This sum was mortgaged to bankers, the solicitor having the mortgage-deed submitted to him, which shewed that the mortgage was entered into for the purpose of preventing the plaintiff being thrown into bankruptcy. The words of the statute 23 & 24 Vict. c. 127. s. 28, so far as they apply to this case, are, "It shall be lawful for the Court or Judge before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare the attorney or solicitor entitled to a charge upon the property recovered or preserved, . . . and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as to such Court and Judge shall appear just and proper."

The principal questions in this case are:—First, whether the money paid into the Court of Bankruptcy, as above stated, is a proper subject of a charge within the true meaning of the Act; secondly, whether this Court has the power under the statute to make the order in this case; and thirdly, whether the Court having, as we think it has, a discretion in the matter, should exercise it in favour of the applicant on the facts before it. Upon the first point the case of *Hunt* v. *Austin* (2) was cited for the applicant, as shewing that money paid into Court was a proper subject for such a charge; but in that case the question whether money paid into Court was the proper subject for a charge within the statute was not in question or discussed: the application was for a summons to shew cause why the sum of money paid into Court should not be paid out to the solicitor in part satisfaction of his taxed costs. The charging order had been apparently obtained *ex parte*, and the application was for substituted service of the above-mentioned summons. [The learned Judge here read the first paragraph of Lord Justice Brett's judgment.] We are of opinion that the Court is not bound, *ex debito justitiæ*, to grant a

(1) Lord Coleridge, C.J., and Grove, J.

(2) 51 Law J. Rep. Q.B. 455; Law Rep. 9 Q.B. D. 598.

charging order in favour of a solicitor out of a fund paid into Court to abide the result of an action: or, in other words, to create a new lien in favour of solicitors. Suppose the money to have been paid into Court by a plaintiff, and he recovers mere nominal damages, the Court not knowing anything of the merits or conduct of the case, it cannot, we think, be reasonably contended that the plaintiff being entitled to take the money out of Court, the solicitor should have a charging order as a matter of course. The money is paid in as security for the defendant, and not as security for the plaintiff's solicitor. It is not, in such a case, recovered or preserved by the solicitor's exertions, except in a collateral way. It is unnecessary for us to decide whether or not, in any case, a solicitor may be entitled to a charge on money paid into Court by his client. In the present case the solicitor has already obtained a charge on the sum recovered—namely, 157*l.*—and we see no reason why he should have a further charge on the 300*l.* paid into Court.

The Act appears to us to vest a discretion in the Court. The words are: "It shall be lawful to make such order"; and, further, for the Court to make such order for taxation, &c., as to such Court and Judge shall appear just and proper. It must also be made by the Court or a Judge, before whom such suit, matter or proceeding has been heard or shall be depending. The object of which provision seems to us to be, that the Court or Judge having cognisance of the matter should be able, from its knowledge of the facts and merits of the case, to properly decide whether the order is a proper one to be made. Here the Court has no such knowledge; the cause and all matters in dispute were decided by a referee, and the money was paid into the Court of Bankruptcy, and by order of that Court. We are, therefore, of opinion that we have no power in this case, within the true meaning of the statute, to make the order asked for; and further, that if we have such power it is discretionary, and, upon the facts before us, we decline to exercise our discretion in favour of the applicant. We have not decided this case upon the question of the fund being mortgaged with the knowledge of the solicitor. In *Faithfull* v. *Ewen* (3) the Court of Appeal, overruling the Master of the Rolls (Sir G. Jessel), held that the solicitor's charge took priority over the mortgage. That was a case where the plaintiff recovered his share and interest in an estate, and the judgment did not apply to the question of money paid into Court. There is some distinction in this case—namely, that here the solicitor knew that the mortgage was to protect his client from being made bankrupt; but we do not think that distinction sufficiently broad to remove this from the authority of that case by the decision in which we are bound.

This motion will be refused with costs.

The solicitors appealed.

Horne Payne, for the appellants.—This specific sum was property "recovered or preserved," within the meaning of 23 & 24 Vict. c. 127. s. 28, by the judgment in the action. If the plaintiff had not succeeded, that sum would have been lost to him. The fact that the money was paid into another Court is immaterial—*Catlow* v. *Catlow* (4). The appellants here rendered meritorious services to the plaintiff; but in *Pinkerton* v. *Easton* (5) there were none: that case, therefore, is not applicable—*Scholefield* v. *Lockwood* (6). Money paid into Court may be property preserved within the meaning of the section—*Emden* v. *Carte* (7) and *Hunt* v. *Austin* (2). Directly the plaintiff obtained judgment he was entitled *ex debito justitiæ* to have the identical sum paid out to him, subject to the rights of third parties—see also *Bulley* v. *Bulley* (8), discussed in *Charlton* v. *Charlton* (9). The Court has jurisdiction to make the order, although the cause and all matters in difference were referred

(3) 47 Law J. Rep. Chanc. 457; Law Rep. 7 Ch. D. 495.
(4) Law Rep. 2 C.P. D. 362.
(5) 42 Law J. Rep. Chanc. 878; Law Rep. 16 Eq. 490.
(6) 38 Law J. Rep. Chanc. 232; Law Rep. 7 Eq. 83.
(7) 51 Law J. Rep. Chanc. 371; Law Rep. 19 Ch. D. 311.
(8) 47 Law J. Rep. Chanc. 841; Law Rep. 8 Ch. D. 479.
(9) 52 Law J. Rep. Chanc. 971; Law Rep. 24 Ch. D. 545.

Pierson v. *Knutsford Estate Co., App.*

—*Birchall* v. *Pugin* (10). As to the discretion of the Court, the facts are almost identical with those in *Faithfull* v. *Ewen* (3), where the charging order was made.

Shiress Will, Q.C., and *Lewis Coward*, for the respondents.—The 300*l.* was not preserved or recovered within the meaning of the statute. There was no such sum in dispute in the action in which a balance of 157*l.* was awarded to Pierson. The 300*l.* had nothing to do with the action. It was merely paid into the Bankruptcy Court in order that Pierson should not be made bankrupt, and it was not a fund over which the Court in the action had any jurisdiction. The section contemplates the fund which is in litigation in the action and which is preserved in the action. *Catlow* v. *Catlow* (4) is no authority on the facts, for there the money was paid into Court specifically as the proceeds of the judgment. The action here was for a debt, but the 300*l.* was not paid into Court in respect of any debt, and could not therefore be applied in payment of any debt.

Horne Payne, in reply, cited *The Phillippine* (11).

BRETT, M.R.—In this case the plaintiff issued a writ of summons against the defendant company, and one Carlton was afterwards joined as a defendant, to recover from the defendant company, or from Carlton, an alleged debt of 727*l.*; so that there was a claim against Carlton for that sum. Carlton thereupon presented a bankruptcy petition against the plaintiff for the same alleged debt of 600*l.* The plaintiff thereupon applied to the Bankruptcy Court for an adjournment, which was granted, of the consideration whether he should be made a bankrupt, upon the condition of 300*l.* being paid by him into Court to abide, not the result of the action, but the further order of the Court of Bankruptcy, which was to be made after the determination of the action between the plaintiff and Carlton. The money was paid into Court, and the action at the trial was referred, for the arbitrator to determine what was to be done with the money paid into Court. The award was made in favour of the plaintiff, and amongst other things the arbitrator awarded that the sum of 300*l.* ought to be paid out to the plaintiff. The plaintiff's solicitors thereupon applied for a charging order upon that sum under section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), upon the ground that that sum had by the litigation, which had been conducted to a determination, been recovered or preserved by them as solicitors for the plaintiff within the meaning of the section.

It has been argued that the only property in respect of which the charge can be made is property which is the direct subject-matter of the action or litigation in which the solicitor has been employed. I do not propose to decide that question. The sum of 300*l.* was paid into Court to abide, not the event of the action, but the further order of the Bankruptcy Court. I do not think it is advisable to attempt to lay down any exhaustive definition as to what is the property which can be said to be property "recovered or preserved." I only deal with this sum of 300*l.* to see whether it is within the section. The sum of 300*l.* was not preserved within the meaning of the statute by the litigation which ended in the award, because it was not sufficiently directly affected by the litigation. After the determination of that litigation the right to that sum depended upon the judicial discretion of the Judge of the Bankruptcy Court, which might be affected by circumstances wholly extraneous to the result of that litigation. The appeal must therefore be dismissed.

BOWEN, L.J.—I agree.

Appeal dismissed.

(10) 44 Law J. Rep. C.P. 278; Law Rep. 10 C.P. 397.

(11) Law Rep. 1 A. & E. 309.

Solicitors—Gregory, Rowcliffes & Rawle, agents for Price, Woodcock & Co., Manchester, for appellants; Kerly, Son & Verden, for Carlton.

[IN THE COURT OF APPEAL.]

1883. Nov. 12, 13, 27. THE LION MUTUAL MARINE INSURANCE ASSOCIATION *v.* TUCKER.*

Company limited by Guarantee—Mutual Insurance Association—Limitation of Liability of Members—Members having twofold Liability—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 9 *and* 38.

A mutual marine insurance association was incorporated under the Companies Act, 1862, *as an association limited by guarantee. The memorandum of association declared that every member undertook to contribute to the assets of the association, in the event of its being wound up, a sum not exceeding* 5*l. for the payment of the debts and liabilities of the association, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves.*

The defendant entered his ship to be insured in the association, and by the rules of the association he, by so doing, also became an insurer of the ships of other members of the association who entered their ships in the same class. While the defendant continued to be a member the association was wound up.

In an action brought, pursuant to the rules of the association, to recover from the defendant a sum of 35*l. as contribution towards losses incurred by other members insured in the same class as that in which he had entered his ship, the defendant contended that his liability was limited by the memorandum of association to a sum of* 5*l.* :—

Held, *that the limit of* 5*l. only applied to the liabilities incurred by the defendant as a member of the association to the association, and that his liability as an insurer towards the other members of the association who entered their ships in the association was not limited to that amount.*

Appeal from the judgment of the Queen's Bench Division on a Special Case.

Action by the Lion Mutual Marine Insurance Association to recover from the defendant Tucker, one of the members of the association, certain contributions towards the losses incurred by certain other members of the association in respect of vessels insured by them in the association.

The Lion Mutual Marine Insurance Association was a company, limited by guarantee, formed for the purpose of mutual marine insurance amongst its members. A person, by entering a ship, became a member of the association, and became thereby insured in respect of the ship or ships so entered for the amount for which the ship was entered to be insured, and also became liable to contribute as an insurer, according to the rules of the association, towards the losses of other members of the association who entered their ships in the same class as that in which he had entered his ship.

This association was, prior to the year 1876, a mutual marine insurance association not incorporated. The objects for which the association was established were, amongst others, the mutual insurance of the ships of the members, and of the ships which the members might be authorised to insure in their own names, and of the ships in which they might be interested. Claims, when passed and settled in accordance with the provisions of the association, were paid by the members in proportion to the amounts insured by them in the association. The association was incorporated in 1876 under the Companies Acts, 1862 and 1867.

The defendant was the owner of two ships which were, in March, 1876, insured and entered in the association in two classes, and from that date the defendant continued to be a member of the association, and was liable for payments in respect of losses incurred by other members of the association who belonged to those classes.

On the 3rd of December, 1878, at an extraordinary general meeting of the members of the association, it was resolved that the association should be wound up voluntarily under the provisions of the Companies Acts, 1862, 1867 and 1877. On the 19th of December this resolution was confirmed, and it was resolved that the committee for passing claims and making calls should continue to act with the liquidator for the purpose of passing claims and doing other business specified in the articles of association until the completion of the winding-up.

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

Accordingly, claims in respect of vessels entered and insured in the two classes of the association in which the defendant had entered his ships were made and settled by the committee, and drafts for the defendant's proportion of such claims were drawn upon the defendant in accordance with the articles and rules of the association. Four calls or claims upon the defendant were sent to him, with notices containing the names of the ships in respect of which the claims were made, the owners thereof to whom the losses were payable, the amount of the claims, the capital for the time being insured in the classes respectively which contributed to the payment of the claims, the dates of the claims, and the rate per cent.

All the losses claimed for occurred prior to the date of the resolution for winding up the association, and while the defendant was a member.

The plaintiffs contended that the defendant was liable for the amounts of the claims made upon him as stated in the notices, and that the same were due from the defendant independently of, and in addition to, any liability on his part under the 5th clause of the memorandum of association. The amounts claimed were admitted to be recoverable subject to the defendant's contention hereinafter mentioned.

The defendant contended that his liability in respect of the said claims and all other debts and liabilities of the said association, and the costs, charges and expenses of the winding up the same, and for the adjustment of the rights of the contributories amongst themselves, was limited to the sum of 5*l.* by virtue of the 5th clause of the memorandum of association.

The question for the opinion of the Court was whether the defendant was liable beyond the sum of 5*l.* If the opinion of the Court should be in the affirmative, then judgment was to be entered for the plaintiffs for the sum of 30*l.* 12*s.* 6*d.* beyond the amount of 5*l.* which had been paid into Court by the defendant, together with interest at five per cent. till payment. If in the negative, then judgment was to be entered for the defendant with costs (1).

(1) The following clauses of the memorandum and articles of association were referred to on the argument:—

The Queen's Bench Division gave judgment for the defendant.

The plaintiff association appealed.

The memorandum of association stated that the company was a company limited by guarantee, not having a capital divided into shares, and further stated the objects of the association to be the "mutual insurance by the association (*a*) of the ships of the members, and of ships which the members may be authorised to insure in their own names, and of ships in which they may be interested; and (*b*) of the freights and outfits of such ships; and (*c*) of the individual members themselves against any liabilities that may be incurred by them personally, as owners or otherwise, in respect of such ships; and (*d*) of all other interests therein or liabilities in respect thereof, every such insurance being undertaken by the association, either as such or on behalf of members of separate classes within the association, but without contribution or liability as between such separate classes except as to working and other expenses; and (*e*) the doing of all such other things (including the affecting and accepting of insurances) as are incidental or conducive to the attainment of the above objects."

5. "Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for the payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding 5*l.*"

Articles of Association:—4. "Every person who, on behalf of himself or any other person or persons, insures or enters for protection any ship or ships, or share or shares of a ship, or the freight or outfit thereof, in the association, shall, as from the date of the commencement of such insurance or protection, be deemed to have become a member of the association, and every such person shall be deemed to have ceased to be a member so soon as he shall no longer have any ship, or share or shares of a ship, or the freight or outfit thereof, under insurance or protection in the association, but without prejudice to the rights and remedies of the association against the person so ceasing to become a member in respect of obligations incurred up to the time of his so ceasing to be a member."

34. "The managers of the association shall comprise the members for the time being of the firm of A. & J. Gray, at present consisting of Andrew Gray and Joseph Gray; the said Andrew Gray and Joseph Gray, or the survivor of them, or the members for the time being of the said firm of A. & J. Gray, being thereby empowered to alter the name and style of, and to admit other members into, their said firm."

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Cohen, Q.C.*, and *Hollams*, for the

36. "The business of the association, and each of the classes or divisions thereof, shall be conducted by the managers according to the rules for the time being of the association, and of such respective classes or divisions thereof."

39. "All policies of insurance issued or underwritten on behalf of any of the said classes shall be issued or underwritten by the managers for the time being of the association in the name of the association, and shall have a copy of the rules of such class or division indorsed thereon or annexed thereto, which shall form part thereof and shall have the same effect as if incorporated and included in these articles; but no person shall, in respect of any insurance or protection in any of the classes or divisions, be liable to pay, or be entitled to receive, any money in respect of any insurance or protection in any other of the classes or divisions."

40. "Every engagement or liability of a member of the association in respect of any insurance or protection shall, for all purposes relating to enforcing such engagement or liability, be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members; and all moneys payable thereunder shall be paid to the managers for the time being of the association."

41. "All claims in respect of insurances or protection shall be made and enforced against the association only, and not against any members thereof; but the association shall not be liable to any member or any other person for the amount of any loss, claim or demand, except to the extent of the funds which the association is able to recover from the members or persons liable for the same, and which are applicable to that purpose."

42. "All payments in respect of any insurance or protection in any of the classes or divisions of the association or otherwise shall be made to or by the managers for the time being of the association, who for this purpose shall represent the association. In case the association shall incur any costs or expenses in or for any legal proceedings or arbitration, or otherwise, in respect of the business of any class, such costs and expenses shall be made good to the association by the members or funds of that class."

44. "Payments or contributions shall from time to time be paid to the managers by the members of each class and division of the association, according to the rules and regulations thereof, for the purpose of providing funds for making any payments necessary or proper to be made by or on behalf of the association for expenses connected with the business thereof or otherwise."

The rules of the association which referred to the classes in which the defendant was insured provided, by rule 2, that the members of the class should severally and respectively insure each other's ships, or shares of ships, from the time of entry until the following February, and so on from year to year. By rule 24, that if any member should refuse to accept draft for his proportion of claims or to pay his contribution, his ships should cease to be insured in the class; but that he should remain liable to contribute to all losses which might occur during the period for which any policy was originally granted; and by rule 28, that the association should only be liable for moneys actually received from contributory members.

plaintiff association.—As soon as the defendant entered his ship according to the terms of the policy and the articles of association, he became liable to pay any losses which might be incurred. The winding up does not abolish that liability for losses incurred before the winding-up. As soon as a loss was incurred the liability of the defendant arose, subject to the amount being ascertained; the sums contributed by the defendant for losses incurred by other members of his class are in reality the premiums paid by him for the insurance of his own ship, and the undertaking by him to pay the losses incurred is independent of any liability for calls upon the shares held by him. The defendant is liable in two ways: he is liable both as a member and as a debtor. He is, in fact, a member and something more.

The Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 7, 9 and 38 (2), *McKewan's*

(2) 25 & 26 Vict. c. 89. s. 7: "The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount (if any) unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company, in the event of its being wound up."

Section 8: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things:"—

Sub-section 4: "A declaration that the liability of the members is limited . . . . "

Section 9: "Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things:"—

Case (3) and *Maxwell's Case* (4) were referred to.

Sir H. Giffard, Q.C., and *D. Brynmôr Jones*, for the defendant.—The question is one of construction; the contract arises from membership alone; the articles of association cannot extend the conditions of membership as laid down in the memorandum of association; the limit of liability is not unreasonable. In *McKewan's Case* (3) there was a specific bargain; the memorandum of association was different and the statute was different: so that the Court there really assumed what has here to be decided. The liability of the defendant is different before the winding-up and after the winding-up. If the members of this association have chosen to limit their liability in a way which, perhaps, the statute did not contemplate, there is no reason why they should not do so, if words were used the proper construction of which will constitute a contract of such a limited nature as that into which it is contended the defendant has entered. The liability of the defendant as a member and as an insurer is co-extensive, and cannot be divided as is suggested by the appellants.

Cur. adv. vult.

BRETT, M.R. (on Nov. 27.)—This appeal is brought from the judgment of the Divisional Court on a Special Case stated in respect of a claim made by the liquidator of a mutual marine insurance company, of which the defendant was member, to recover from him a sum of money as a contribution to the funds of the association of which he is the liquidator.

The association was in course of being wound up, and the liquidator accordingly sued the defendant for a contribution in respect of losses which happened before the winding-up. The contribution thus claimed amounted to more than 5*l.*, and the defendant has paid into Court, or is to be taken as having done so, the sum of 5*l.*, alleging that he is not liable for any larger amount; and with that contention the Divisional Court agreed, and gave judgment for the defendant.

The case on behalf of the plaintiff association is that in respect of losses the defendant is an insurer, that he is with others liable as an insurer, and that he is indebted in form to the association but in reality to those who have incurred losses. For it is urged on behalf of the plaintiff that the money claimed is a debt due to the liquidator, that it is an asset of the association, and that such a payment as is now claimed is not interfered with by the provisions of the Companies Act, 1862, on which the defendant places reliance. The defendant maintains that this association is an association within section 9 of the Act of 1862 (2); that in such a case it is necessary that there should be a declaration in the memorandum of association limiting the liability of the members; that in this case there was such a declaration, and it is argued that the declaration limited the liability of members to 5*l.*: so that the liability of the defendant is limited, that the provisions of section 38 (2) cover this case, and therefore that he is not liable in this action.

The case depends upon the true con-

Sub-section 4: "A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required not exceeding a specified amount."

Section 38: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following:"—

Sub-section 4: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member."

Sub-section 5: "In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association."

(3) 46 Law J. Rep. Chanc. 19; Law Rep. 6 Ch. D. 447.

(4) 14 Law J. Rep. Chanc. 423; Law Rep. 20 Eq. 585.

struction of the Companies Act, 1862, and of the declaration in the articles of the association, which declaration is in the words of the statute. The question is, whether the contribution claimed in this action is a liability attaching to the defendant as a member of the association within the meaning of section 9, sub-section 4, and section 38, sub-section 5 (2). Without doubt the sum claimed is, in terms, a contribution by the defendant as a member of the association; but it is also a liability of the defendant as a member of the association. The words of the statute relied on do, when taken in one sense, protect the defendant; but that is not enough to decide this case: for it is, I consider, a well settled rule that in construing a statute or a document it is not right to follow merely the words of the statute or document, taking them in their ordinary grammatical meaning: but it is necessary also to apply those words to the subject-matter dealt with in the statute or document, and then to construe them with reference to that subject-matter, unless there is something which compels one not so to construe them. The rule is, I think, that the ordinary meaning of the words used in the English language must be applied to the subject-matter under consideration.

The statute which we have to construe applies to several subjects. The articles of association of this association deal with the subject-matter of mutual marine assurance; but the articles of association and the statute are couched in the same terms, save as to the sum limited. This leads me to consider what are the conditions and the characteristics of the subject-matter dealt with.

This was a mutual marine insurance association—that is, an association well known in mercantile law. It is a society of which persons become members by putting their ships into the association for the purposes of insurance. The association is divided into classes; a member can place his ship in one of several classes, and the rules provide that when a ship is placed in the association, and the amount of the insurance and the class is named, the person so putting his ship in becomes a member of that class; but he is not only a member, he is also an assured person. By whom is such a person assured? By other members of his own class. The same act also makes him an insurer. As an assured he is so in respect of a consideration moving from him to the other members of the class; he is assured to that extent in the case of loss, whether there be or be not a loss. The consideration is, in insurance law, called premium; and the premium may be a money payment—but it may also be a liability. Such a member may be liable for the premium, and in respect of that premium he is entitled to an indemnity when loss happens; and when a loss occurs which is not his own, then his premium is his liability to pay. Considering the member as an assured, that is his position and that is his premium. If the member is considered as one who insures others, the premium paid to him is the right to have his loss paid, and his liability is that he is bound to pay others if they suffer loss. Those losses are, in truth, not paid to the association, nor are they paid to every member of the association; but yet the members who have to pay do pay the amount of the losses incurred by other members to such members, either as premium on the policy of insurance or as loss on the policies of those other members; but in neither case is the payment made to the whole company, but only to those who have lost their ships. But it has been agreed, and the law allows the agreement, that the individual member shall not sue; but that the association shall sue, and shall sue the member who does not pay, on behalf of those only who have suffered loss and who belong to the same class as the insurer. The defendant to such an action is clearly a member of the association; but he is also something more: he is also assured by some other members, and is, at the same time, the insurer of other members. It is obvious that in such societies there must be expenses and liabilities of such an association, as an association as a whole—such as officers and offices—which are expenses and liabilities of the association as distinguished from those liabilities which result from insurances and losses, because no liability in respect of insurance arises on either side until there has been a loss. Suppose, then, that an association such as this does not

incur any losses, there would then be no liability in respect of insurance; but yet there would be expenses of the association, and they would be expenses in respect of which the association would look to the members of the association as members; and, further, there would also be expenses amongst the members themselves. Turning now to the statute, we find that where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, "the memorandum of association shall contain the following things"—and then follows a list. Section 9 provides that "where a company is formed on the principle of having the liability of its members limited to such an amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things"—and then follows a list of those things. Now, applying the language of the statute, it is, I think, correct to say that the "liability of its members" means the liability of members as such members, and that the declaration in the memorandum of association also refers to the liability of the members as such. Then section 38 of the statute enacts that "In the event of a company formed under this Act being wound up, every past and present member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories, amongst themselves, with the qualifications following"—that is to say, "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association." Now the contribution here spoken of seems to me to mean contribution as a member. Then, reading the declaration in the memorandum of association, we find that the member is, by clause 5, to contribute for "the payment of the debts and liabilities of the association."

In one sense, indeed, the amount of losses is a debt or liability of the association, inasmuch as the person who has suffered the loss sues the association and not each individual defendant; but is it so within the meaning of the statute and the memorandum or articles of association? The debts and liabilities there mentioned are the debts and liabilities in respect of which it is necessary that there should be a declaration in the memorandum or articles made under the statute, and are the debts and liabilities of the association as against the members, viewed as members only and not regarded as insurers or persons assured. If this be so, then the limit of 5*l.* is the limit of the liability of the members in respect of the liabilities of the association to which it asks the members to contribute as such members, but it is not the limit of the liabilities of the members in respect of their position as assured and insurers.

If the words of the Act and articles are read so as to cover and include this case and to exclude the liability of the defendant in this action, the conclusion is ridiculous and absurd. Could it be that, because when others have paid their share, the defendant, who has delayed to pay and has not paid when the winding-up is begun, can take advantage of his delay and pay less than other members who have paid in time? That is not other than absurd; whereas, if the words are read in the other sense, then justice is done, for the defendant is left liable to make good that which the association ought to have paid to the person who suffered the loss, and he pays that amount at the suit of the association brought through and by the liquidator. He is bound, also, to contribute to the other expenses of the association to the limited amount; so that in respect of such the association can in his case recover 5*l.* only. He has, therefore, not entered into any unlimited liability, for his liability in respect of losses was

limited by the amount in which he and others have insured their own ships; and as to other expenses not incidental to assurance he is limited by the sum named in the articles of association.

This reading is the sensible, just and businesslike reading, and therefore I am of opinion that the appeal must succeed.

BOWEN, L.J.—I am of the same opinion. The sum claimed in this action is not a contribution to the assets of the association within the meaning of the Act of 1862. If it were, the language of subsection 5 of section 38 might raise a difficulty; but it seems to me that the sum claimed is the contribution of a sum agreed on between the defendant and the association and his fellows in that association, to be paid to the association as and for insuring certain other persons in his own class.

The Act, if examined, will bear out this view: it defines the liability of a member of the association, and it limits the liability of such a member in the case of such an association as this in the way pointed in section 9. The liability thus pointed at is the liability of a member as such; the word "member" is not defined in the statute, but, speaking broadly, those persons are members who are shareholders and who contribute by agreement to the expenses of the association. The liability here sought to be enforced is not that which a person incurs who becomes a member of an incorporated association, but the liability under the memorandum of association and the articles of association by which the member is himself assured and also insures others, and by which he undertakes and enjoys the necessary rights and liabilities of an assured and insurer as between himself and the other members of the class which he joins. The memorandum of association shews what the business of this association is, and shews that the narrow construction suggested is not possible. Clause 4 of that memorandum shews that a liability greater than the sum of 5*l.* is intended, and clause 5 shews that, though the intention of the memorandum is to limit the liability of a member to the association, it does not intend to limit the liability of the members as between themselves to that amount should a larger sum be required. It is not, indeed, possible to conceive that this association could be framed on such a basis as that suggested, or that members can, after enjoying all the benefits of the association, leave it when in liquidation upon paying 5*l.*, irrespective of all the benefits enjoyed in consequence of membership. The articles of association shew how the association was carried on, and the business effect of these articles is that the assured and insurers in each of the several classes are to be interdependent one upon each other, and that the members of the various classes are those who find funds to discharge the losses suffered in that class. It is clear also that the corporate name of the association is the machinery which is given by law for the enforcement of liabilities, but that this corporate personality is machinery only; the legal liability incurred is more than a liability to contribute under section 38, it is a real business obligation, to which those who sign the articles of association bind themselves. A person so signing becomes a member of the association within the meaning of the Act of 1862; but he also becomes an assured and an insurer, and is thereby entitled to enjoy the benefits, and bound to undertake the burdens, of the relation thus created between himself and other members.

BRETT, M.R.—The Lord Chief Justice agrees in the decision which we have given.

Appeal allowed.

Solicitors—Hollams, Son & Coward, for plaintiffs; Williamson, Hill & Co., agents for H. H. Field, Swansea, for defendant.

[IN THE COURT OF APPEAL.]

1884. Jan. 31. Feb. 1, 12. REEVES *v.* BARLOW.

Bill of Sale—Building Agreement—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4; *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

A building agreement provided that all building and other materials brought upon the land by the builder, the intended lessee, should, whether affixed to the freehold or not, become the property of the owner of the land, the intended lessor:—Held, *affirming the judgment of the Queen's Bench Division, that this agreement was not a bill of sale within the Bills of Sale Act*, 1878.

Appeal from the judgment of the Queen's Bench Division making a rule absolute to enter a verdict for the defendant.

On the 1st of January, 1883, Addie entered into an agreement with Barlow to build ninety-five houses on certain land belonging to Barlow, of which land a lease was intended to be made to him. This agreement was contained in a building agreement, by which it was provided that Addie should be at liberty to enter on Barlow's land, that the plans of the intended buildings should be approved by Barlow, and the 11th clause was as follows:—"The intended lessee" (meaning Addie) "shall not remove or excavate any turf, clay, gravel or soil on the said land without the previous consent in writing of the surveyor, except from off the sites of houses the erection of which shall be about to be immediately commenced, or for the purpose of forming the said roads, and shall not, without such consent first had and obtained, remove from off the said lands, for sale or otherwise, any timber, turf, clay, gravel or brick earth, or other materials which may be cut down, taken or excavated therefrom; and it is also agreed that all building and other materials brought by the intended lessee upon the said land shall, whether affixed to the freehold or not, become the property of the said intended lessor" (meaning Barlow). No lease was granted. After this agreement was made Addie began to build the houses, and for the purpose of building them he brought on to the land building materials and a number of bricks. In February, 1883, the bricks were seized under a *fi. fa.* issued by Reeves, who had obtained three judgments against Addie. Barlow claimed the bricks under the provisions of the building agreement, and gave the sheriff notice to withdraw. An interpleader summons was then taken out, and an issue directed, in which Reeves, the execution creditor, was the plaintiff and Barlow, the claimant, was the defendant.

The County Court Judge held that the building agreement was a bill of sale within 41 & 42 Vict. c. 31. s. 4, and that as it had not been registered pursuant to section 8 it was void as against the plaintiff, and he gave judgment for the plaintiff.

A rule *nisi* was obtained in the Queen's Bench Division to enter judgment for the defendant, and this was made absolute.

The plaintiff appealed.

E. Harrison, for the plaintiff.—The question is whether this document is required to be registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8. If the materials became the absolute property of Barlow, the deed required registration as a bill of sale. Before the Act of 1878 it was held that a building contract like the present one did not require registration under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), because it merely gave an equitable interest in the building materials to the landowner, and was not an assignment or a licence to take possession of chattels as security for a debt—*Brown* v. *Bateman* (1). The definition of a bill of sale in the Act of 1878 differs from that of the Act of 1854. The words "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred," were intended to meet the present case. The case of *Brown* v. *Bateman* (1) was also followed in *Blake* v.

* *Coram* Coleridge, L.C.J.; Brett, M.R., and Bowen, L.J.

(1) 36 Law J. Rep. C.P. 134; Law Rep. 2 C.P. 272.

Izard (2). The words of clause 11, that the materials, "whether affixed to the freehold or not, shall become the property of the lessor," shew a clearer indication to pass an interest than did the agreement in *Brown* v. *Bateman* (1); but they would only pass the equitable, not the legal, interest in them. A legal interest in property *in futuro* cannot so pass—*Belding* v. *Read* (3). The cases cited shew it was not intended that an agreement of this kind should be registered under the Act of 1854; but this was altered by the Act of 1878. The plaintiff has a right in equity to the goods under this Act, and that right arises when the goods become sufficiently identified. Section 4 of the Act of 1878 excludes certain agreements from registration; but a building agreement is not mentioned: the Legislature therefore intended to bring building agreements within the section. There is a distinction between a licence to seize property which comes upon the land, and words which purport to confer an interest in after-acquired property. The contract in *Reeve* v. *Whitmore* (4) created a present interest in the building materials, but it merely gave a power to seize, and did not operate as an assignment. The deed here creates an interest which gives an equitable right to the chattels—*Holroyd* v. *Marshall* (5) and *Collyer* v. *Isaacs* (6). Upon the happening of the condition, the Court will enforce the right.

Moreover, the Bills of Sale Act, 1882, s. 15, does not repeal section 8 of the Act of 1878 as to bills of sale not given by way of security for a debt. That Act only repeals section 20 of the Act of 1878 in respect of bills of sale given by way of security for the payment of money—*Swift* v. *Pannell* (7). This deed is not such a security, but is an absolute bill of sale.

Ex parte The North Western Bank (8) was also cited.

(2) 16 W.R. 108.
(3) 3 Hurl. & C. 955; 34 Law J. Rep. Exch. 212.
(4) 4 De Gex, J. & S. 1; 33 Law J. Rep. Chanc. 63.
(5) 10 H.L. Cas. 191; 33 Law J. Rep. Chanc. 193.
(6) 51 Law J. Rep. Chanc. 14; Law Rep. 19 Ch. D. 342.
(7) 53 Law J. Rep. Chanc. 341; Law Rep. 24 Ch. D. 210.
(8) 42 Law J. Rep. Bankr. 6; Law Rep. 15 Eq. 69.

Finlay, Q.C., and *J. C. Graham*, for the defendant.—Assuming that section 8 of the Act of 1878 is still so far in force, the decisions shew that whether the agreement creates a legal or equitable interest, the Bills of Sale Act, 1854, has no application. The words in the Act of 1878 which relate to legal interests are the same as in the Act of 1854, and the only addition is the words relating to the creation of a right in equity to personal chattels. If the words which relate to the passing of the legal interest are the same in the Act of 1878 as in the Act of 1854, then registration of this document as a bill of sale is unnecessary—*Brown* v. *Bateman* (1). The words of section 4 of the Act of 1878 are identical with those of section 1 of the Act of 1854, which has been held not to apply to such a document as the present. The transfer of the property is merely made in the way of trade, and an agreement of this kind is excepted from and does not come within the scope of the Act. The Act of 1878 does contain a clause giving a right to seize personal chattels, but it is confined to cases where security is given for any debt.

Cur. adv. vult.

BOWEN, L.J. (on Feb. 12), delivered the judgment of the Court:—

This case raises the important question whether an agreement contained in an ordinary building contract, that all building and other materials brought by the builder on the land should become the property of the landowner, is a bill of sale within the Bills of Sale Act, 1878, and must be registered, in order to protect such building materials against an execution creditor.

On the 1st of January, 1883, Addie, the builder and execution debtor, had contracted in writing with Barlow, the landowner, to build upon Barlow's land 95 houses. The contract in question is an ordinary building agreement, which provided by clause 1 that Addie should be at liberty to enter upon Barlow's land for the purpose of making the roads and erecting the houses. By clause 11 it was provided, amongst other things, "that all building and other materials brought by the intended lessee upon the land shall, whether affixed to the freehold or not, become the pro-

perty of the intended lessor." Reeves, the plaintiff in the interpleader issue, having recovered judgment against Addie, had issued execution, and the sheriff of Kent seized a large number of bricks brought upon Barlow's land, under the above clause 11. An interpleader issue having been directed between Reeves and Barlow, the County Court Judge before whom the interpleader was tried decided in favour of the execution creditor. The Queen's Bench Division reversed his decision, and the present case is an appeal from that reversal. If the present case had arisen upon the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), the case of *Blake* v. *Izard* (2) would appear to be an authority in favour of the contention that such an agreement was not a bill of sale which required registration. The question, however, arises under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31. s. 4), which adds to the definitions of bills of sale contained in the previous statute the following words: "Also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

It was contended on behalf of the appellants that the case of *Blake* v. *Izard* (2) was not binding on this Court, and that, in any event, the present agreement fell within the additional words of the Act of 1878, and must be registered accordingly. The case of *Blake* v. *Izard* (2) had been preceded in the same year by another decision in the Court of Common Pleas in the case of *Brown* v. *Bateman* (1), which involved the same point. In *Brown* v. *Bateman* (1) there was no agreement in unambiguous terms that the property in the building materials should pass to the lessor when they were brought upon the lessor's premises; but merely a provision that materials which should have been brought upon the premises should be considered as immediately attached to and to belong to the same. Two questions accordingly arose upon this clause. The first, whether it conferred upon the lessor on whose land the building materials had been brought an interest either in law or in equity in such building materials which could not be defeated by the claim of an execution creditor.

The second question which arose was whether, assuming such an interest to be created by the clause, the bill of sale ought to have been registered under the Bills of Sale Act, 1854. With respect to the first question, whether an interest in law or equity were created by the clause, the Court of Common Pleas abstained from pronouncing any opinion whether the words of the clause were sufficient to vest the legal property of the materials in the lessor; but decided that, at all events, an equitable interest in them was created which gave the lessor the right to hold the goods against the execution creditor, unless the agreement was void for want of registration under the statute. To decide this latter point, it was, however, necessary for the Court to assume the possibility of the view being correct which they expressly refused to decide—namely, that the legal property vested in the landlord; and it follows from the judgments in that case that the Court must have meant to decide that, even on this hypothesis, the instrument was not within the Bills of Sale Act, 1854. "It is said," said Chief Justice Bovill, that the agreement "is covered by the words 'other assurances of personal chattels'; but, finding those words preceded by 'assignments, transfers and declarations of trust,' and applying to the statute the ordinary rule of construction, it seems to me that the agreement in question is not *ejusdem generis* with those with which the words relied on are associated, and therefore that it is not within them."

This decision was followed by the Court of Common Pleas in the case of *Blake* v. *Izard* (2), to which we have already referred, decided a few months later in the same year. The building agreement in this latter case was framed in a manner which avoided the first question raised in *Brown* v. *Bateman* (1), it being expressly provided that all materials brought upon the premises should become the property of the lessors. The Court held that this agreement was not within the Bills of Sale Act, 1854, and Mr. Justice Willes, in delivering judgment, uses the following language: "This Court has in the

case of *Brown* v. *Bateman* (1) decided to respect the evident intention of the parties under these agreements. It was intended to preserve the rights of landlords, and I consider it was a most wholesome decision. It has been contended that it is a bill of sale, or that it comes within the scope of the Bills of Sale Act; but I apprehend that that question is set at rest by *Brown* v. *Bateman* (1), which shews that stipulations of the nature of building agreements are not within the scope of the Bills of Sale Act." Down to the time of the passing of the next Bills of Sale Act, the two cases of *Brown* v. *Bateman* (1) and *Blake* v. *Izard* (2) remained unshaken decisions of a Court of great weight. It must be taken, therefore, that at the time of the Bills of Sale Act, 1878, building agreements such as the present had been held not to be bills of sale which required registration; and we should not be justified in impugning the authority of those cases, unless there be something in the Bills of Sale Act which brings specifically within its operation this large class of business instruments which had previously been decided to be exempt. The learned counsel for the appellant contended that the previously excepted case of such building agreements was directly met by the new words which the Act of 1878 for the first time introduced into the interpretation clause, and that the present agreement must be registered as being an agreement by which a right in equity to personal chattels is conferred. On the part of the respondent it was urged that a right to after-acquired property was not a right to personal chattels within the meaning of the Act of 1878. It is not necessary to pronounce an authoritative decision on this very grave point (as to which, however, see *per* Lord Chelmsford in *Holroyd* v. *Marshall* (5)), because, in our judgment, whatever right is conferred by the clause of the building agreement now under discussion, is not a right in equity at all, but a right at law.

Down to the time when the building materials were brought upon the landlord's premises, there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises; and, till this happened, there was no right or interest in equity to any specific goods at all.

Upon the other hand, the moment the goods were brought upon the premises, the property in them passed in law, and nothing was left upon which any equity, as distinct from law, could attach. No further performance of the contract was necessary, nor could be enforced. The building agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that upon the happening of a particular event the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody. *Reeve* v. *Whitmore* (4) and *Holroyd* v. *Marshall* (5) have therefore no immediate bearing on the present case. If the present agreement does not fall within the Bills of Sale Act, 1878, as conferring a right in equity, it is still governed by the decisions in *Brown* v. *Bateman* (1) and *Blake* v. *Izard* (2), which, for the reasons we have mentioned, we are not prepared to review. If it had been the intention of the Legislature to bring within the scope of the Act the important class of building agreements couched in this form, we think this would have been done in clear terms, and that the old interpretation clause of the former Bills of Sales Act, which, so far as these instruments are concerned, had received judicial construction which excludes them, would not have been left practically unaltered.

For these reasons we are of opinion that the judgment of the Court of Queen's Bench was right, and must be affirmed, with costs.

Appeal dismissed.

Solicitors—Sole, Turner & Knight, agents for Cripps, Tonbridge Wells, for defendant; Last & Sons, for plaintiff.

1883.
Dec. 10, 11.
1884.
Jan. 22.

SIR T. P. HEYWOOD (BART.) *v.* THE BISHOP OF MANCHESTER.

Church—Benefice—Advowson—Refusal by Bishop to institute Presentee—Unfitness—Offences against Ritual.

A bishop refused to institute to a benefice a presentee who, as a curate, habitually offended against the law in matters of ritual, and who would not promise not to repeat the acts whereby he offended:—Held, *that such a presentee might be refused.*

This was an action by the patron of the living of St. John's, Miles Platting, in respect of a refusal by the defendant to institute thereto the Rev. Harry Cowgill, the plaintiff's presentee. The facts and arguments are stated in the judgment.

Charles, Q.C., and *Phillimore*, for the plaintiff.

The Solicitor-General (*Sir F. Herschell, Q.C.*) (*Jeune* with him), for the defendant.

POLLOCK, B. (on January 22).—This is an action, in the nature of a *quare impedit*, whereby the plaintiff claims a declaration that he is entitled to have one Harry Cowgill admitted, instituted and inducted to the church, rectory and benefice of St. John the Evangelist, Miles Platting. The plaintiff, after alleging that he is seised in fee and entitled to the advowson of that rectory and benefice, alleges that he presented thereto the Rev. Sidney Faithorne Green, who was duly admitted, instituted and inducted in June, 1869; that the said Green remained incumbent until November, 1882, when the benefice became vacant; and thereupon the plaintiff presented to the defendant the Rev. Harry Cowgill, a fit clerk, and requested the defendant to admit and institute him, and to cause or procure him to be inducted into the possession of the rectory and benefice. The statement of claim then alleges that the defendant has refused and still refuses so to do, and unjustly hinders the plaintiff in the exercise of his rights.

The defendant, by his statement of defence, admits the right of the plaintiff to present, but he alleges that the said Cowgill was curate to the said Green from 1877, and remained as such curate or assistant-minister, or in charge of the said church, until the 2nd of November, 1882; that while the said Cowgill was such curate, and while he was in charge of the church, he habitually did certain acts. The material of these are as follows:—

1. When officiating in the communion service wore certain unlawful ecclesiastical vestments other than and besides or instead of those appointed and allowed by law—that is to say, a cope, or chasuble, and alb, and a stole.

2. When officiating in the communion service unlawfully mixed or caused to be mixed water with the sacramental wine used in the communion, and also administered wine mixed with water to the communicants at the Lord's Supper.

3. Unlawfully used lighted candles on the communion table at which the communion was at the said time being celebrated, or on a ledge immediately over the same during the celebration by him of the holy communion, and when such lighted candles were not wanted for the purpose of giving light.

4. When officiating in the communion service and saying the prayer of consecration in the said service did not continue in a standing posture, but unlawfully knelt or bent the knee during the reading thereof.

5. When officiating in the communion service elevated the paten or bread or wafer, and also the cup, which had been placed on the holy table for the communion, in an unauthorised manner, and in a much greater degree than was necessary for the purpose of complying with any of the rubrics or requirements of the Book of Common Prayer and of the communion service.

The defendant alleges that by reason of these acts, and the circumstances under which the same were done, Cowgill was guilty of committing offences against the laws ecclesiastical, of failure to observe the Book of Common Prayer, and of obstinate disobedience to the laws, canons and constitutions of the Church. Further, that the defendant examined the said Cowgill of his fitness for the said rectory and

benefice. At the examination it appeared, from the answers of the said Cowgill to the defendant, that he had habitually, while such curate or assistant-minister as aforesaid, committed the acts, matters and things set forth in the first three sub-sections of the 4th paragraph of the statement of defence, and further that he refused to celebrate divine service according to the Book of Common Prayer in respect of the said acts, matters and things; whereupon the defendant found that the said Cowgill was a person unfit to have the said rectory and benefice.

The plaintiff, by his reply, states that the said Cowgill became assistant-curate at St. John's, Miles Platting, in 1877, and continued so to be till the 31st of October, 1882 (but not assistant-minister or in charge of the said church), all with the knowledge and permission of the defendant, but without receiving any licence or authority in writing from the defendant, and that he never was a licensed stipendiary curate at St. John's or a beneficed priest, and that, by reason of his never having attained such a position, the defendant could have at any time recalled his said permission and summarily inhibited him from officiating in the said church and elsewhere within his diocese; but the defendant did not inhibit the said Cowgill, and did not before the 2nd of November, 1882, recall his said permission. The plaintiff further says that the said Cowgill was never admonished or censured by the defendant, or by any other ecclesiastical authority, for doing any of the matters alleged against him; nor was he warned or commanded by the defendant, or by any other ecclesiastical authority, not to do any of the said matters; and that no suit or proceedings in any Court ecclesiastical had been at any time brought, or was at the time of his presentation and refusal pending, against the said Cowgill in respect of any of the said matters, neither had any indictment been preferred against him in respect of the same. The plaintiff also says that the defendant was well aware of the way or ways in which divine service was conducted at Miles Platting from the beginning of 1878 till the 2nd of November, 1882; and denies that the vestments mentioned in the statement of defence would be unlawful ecclesiastical vestments for a clergyman in priest's orders ministering in the said church of St. John's; and denies that any of the matters and things further alleged in the statement of defence would be unlawful. He further states it was not for the reasons stated in the statement of defence that the defendant refused to admit and institute the said Cowgill; but that he so refused because the said Cowgill declined to make certain subscriptions and declarations other than and additional to those appointed by law, which the defendant required of him, and because the said Cowgill refused to pledge himself, upon the defendant's requirement, before institution, to conduct divine service in accordance with a certain standard or use prescribed by the defendant in a document published by him in November, 1881, and because he refused to promise, upon the defendant's requirement, before institution, to comply with such admonition as the defendant might have thought fit then to give him in regard to the future conduct of divine service in the said church.

Upon the trial, which took place before me on the 10th and 11th of December, 1883, the defendant was called as a witness, and, after giving the dates of the proceedings against Mr. Green, stated that a monition issued against Mr. Green, and he was inhibited from performing service at St. John's, Miles Platting; that in the autumn of 1882, Mr. Green having failed to comply with the terms of the monition, the living became vacant under the provisions of the Public Worship Regulation Act; that on the 24th of October, 1882, the defendant saw Mr. Cowgill with reference to his charge, and informed him that on the 27th of September he (the defendant) had informed the patron that the living was vacant, and that he was willing, if Mr. Cowgill would conduct the service of the church in accordance with law, to leave him in charge of the vacancy. Mr. Cowgill then asked for a week to consider the matter. On the 31st of October Mr. Cowgill stated that he could not accept the charge of the living on those terms. On the 27th of September the defendant gave notice to the plaintiff of the vacancy, and on the 8th of November the defendant received a letter

from the plaintiff announcing his intention to appoint Mr. Cowgill to the living.

On the 21st of November Mr. Cowgill was nominated by the plaintiff; and, after two letters had passed between the defendant and Mr. Cowgill, the defendant appointed the 2nd of December to see Mr. Cowgill, and they met on that day, the Archdeacon of the diocese being present. Upon that occasion Mr. Cowgill asked to be allowed to bring a witness, and the meeting was postponed.

On the 13th of December the defendant met Mr. Cowgill; when Archdeacon Anson, Mr. Burder, and the Rev. H. Heywood, a friend of Mr. Cowgill's, were present. The defendant then recapitulated what had taken place at the last meeting, and asked Mr. Cowgill if he would limit his ritual practice to the terms which the defendant had laid down upon the 25th of November, 1881, in his admonition to the clergy of his diocese. The portion of the admonition which bears upon the present case was as follows:—"I do hereby make it known to the clergy of my diocese that it is my admonition to them, as their Bishop, that, until it shall be otherwise ordered by lawful authority, in public worship in their churches, and specially in the administration of the Holy Communion, they do not exceed the limits of the ritual now practised and allowed, or which may hereafter be allowed, in the cathedral church of the diocese."

Mr. Cowgill said he considered that to give up the vestments would be to dishonour Christ, and handed in a written protest against the proceedings, which was in the following terms:—"Having since the last interview I had with your Lordship further considered the matter, and taken the advice of friends, I respectfully submit that your Lordship has no right to proceed, as you proposed on the last occasion, to further examine me, or to compel me to give answers to the special questions which you have framed. I have been ordained by an English Bishop. I produce full testimonials from three clergymen in your diocese. I have been and am under no Church censure. No charge of any ecclesiastical offence has been brought against me, or is now pending. I have been officiating for more than five years in your diocese with your knowledge and permission. I am ready to take all the oaths, declarations and subscriptions required by law. In these circumstances it is not usual, nor is it, I submit, legal, to subject a presentee to any further examination. Assuming (which, however, I am not to be taken to admit) that Canon XXXIX., to which you referred, is binding and applies to my case, and has not been repealed by the Clerical Subscription Act and the new canons, I submit that your Lordship has already had examination of my fitness within the terms of that canon, and I protest most respectfully against anything further. If, after hearing this protest, your Lordship still requires me to answer, I will do so out of respect, but under protest, and saving all my rights and those of my patron.—H. Cowgill." Mr. Cowgill also disputed the right of the defendant to question him, and said that the canon only meant that the Bishop was to enquire and ascertain, and that the certificate of the three clergymen which he had presented was sufficient. Mr. Cowgill's friend, Mr. Heywood, then advised him to answer such questions as should be put to him by the defendant, and the defendant commenced to read to him questions in writing; but, Mr. Cowgill wishing for legal advice, the meeting was adjourned until the 15th of December, the defendant giving to Mr. Cowgill a copy of the questions.

Upon the 15th of December the same parties met again, and Mr. Cowgill handed in a written answer to the questions. These questions and the answers thereto were as follows:—*Q.* Is it your opinion that the vestments known as the alb and chasuble appointed in King Edward VI.'s First Book are still lawful vestments for the priest to wear in ministering the Holy Communion according to the ritual now authorised in the Church of England?—*A.* It is my opinion that they are lawful, the Ornaments Rubric never having been repealed. *Q.* Have you not been in the habit of wearing them in such ministration during the time that you have been officiating in the parish of St. John, Miles Platting?—*A.* As assistant-curate of St. John's, Miles Platting, under the Rev. S. F. Green, I have been in the

habit of wearing a vestment and an alb, and without any interference from your Lordship when the matter was brought to your notice. *Q.* Is it your intention to wear these vestments if you are instituted to the rectory of the said parish?—In reference to this question Mr. Cowgill declined to make any engagement with regard to his future action. *Q.* Is it your opinion that the use of the mixed chalice in the Holy Communion is lawful, according to the ritual now authorised in the Church of England?—In reply, Mr. Cowgill considered there was nothing in the Prayer Book prohibiting the use of the mixed chalice, but asked permission for more time to consider the question before giving further answer as to legality. *Q.* Have you not been in the habit of using the mixed chalice when ministering the Holy Communion in the church of St. John, Miles Platting?—Mr. Cowgill in reply stated that as assistant-curate to Mr. Green he had used it under his direction. *Q.* Is it your intention to use the mixed chalice in the administration of the Holy Communion if you are instituted to the rectory of the said parish?—In reply Mr. Cowgill declined to make any engagement as regarded the future. *Q.* Is it your opinion that the ceremonial lighting of candles at the ministration of the Holy Communion is lawful, according to the ritual now authorised in the Church of England?—Mr. Cowgill replied that he had seen them lighted all his life, and did not feel himself then in a position to express an opinion as to their legality. *Q.* Have you not been in the habit of lighting, or causing to be lighted, candles in such ceremonial manner, and not for the mere purpose of giving light, at the ministration of the Holy Communion, while you have been officiating in the church of St. John, Miles Platting?—In reply Mr. Cowgill admitted having done so as assistant-curate under the instruction of his incumbent. *Q.* Is it your intention to use candles ceremonially lighted at the ministration of the Holy Communion if and when you should be rector of St. John's, Miles Platting?—In regard to this question Mr. Cowgill declined to make any engagement for the future. When the defendant got as far as the sixth question, Mr. Cowgill said in answer, verbally, that he declined to give any engagement, and said that, having laboured with Mr. Green, whom he respected more than any man in the world, to bring the services of St. John's to their present point, he should regard himself as worse than Judas Iscariot towards Mr. Green if he undid his work. Mr. Cowgill also said that he was ready to take all the oaths, and make all the subscriptions required, *ex animo*: upon which the defendant asked him *ex animo cujus*, *ex animo imponentis*, or *ex animo recipientis*? and added that it seemed almost a profaneness to administer the oath of canonical obedience in the sense in which he was prepared to take it. That closed the interview.

Upon the 18th of December the defendant wrote to the plaintiff, saying that, with great regret, he was obliged to refuse to institute his presentee. On the 19th of December the defendant wrote to Mr. Cowgill as follows:—"After long and anxious consideration of all the circumstances of the case, I have been compelled, to my deep regret, and only by a strong sense of duty, to inform the patron of St. John's, Miles Platting, that I am unable to institute you to that benefice, to which you have been presented by him. The reasons for my refusal I have communicated to Sir Percival Heywood at large. I have only to add, that if you could have seen your way to promise compliance with such admonition as I, as your Bishop, might have thought fit to give you in regard to the future conduct of divine service in the church of St. John, Miles Platting, I should have felt no difficulty in instituting you. Nor is it too late to remove this difficulty now. I most earnestly desire that, for the sake of the peace of the Church, you would remove it."

No evidence was offered at the trial of the illegal acts alleged to have been done by Mr. Cowgill beyond his own admissions contained in his answers to the questions put by the defendant. It was admitted, however, by the plaintiff's counsel, as to the fourth charge, that Mr. Cowgill "bent the knee," as alleged in that charge; and as to the fifth charge, that Mr. Cowgill elevated the paten and cup to the height of the head, and that he continued to do

so down to the 24th of October, 1882. It was also agreed by counsel that the value of the living was 300*l.* per annum.

It will be seen, by the pleadings, that two points arising out of the course taken by the defendant are raised for the determination of this Court. The plaintiff's first proposition is, that no sufficient ground for refusal to admit and institute his nominee is shewn by the statement of defence, or the evidence given in support of it. Secondly, the plaintiff says that, even admitting that the defendant has shewn that good ground for refusal existed, he was bound to set forth that ground by his statement of defence and prove it by evidence; and that, although the ground of refusal set forth by the statement of defence is that Mr. Cowgill had done acts which might be a sufficient cause for refusal, the true ground, in fact, for the refusal was not the doing of these acts by Mr. Cowgill, but that he would not submit to the proposal of the defendant and promise that he would limit his ritual practice to the terms which the defendant had laid down by his admonition to the clergy of his diocese. I need hardly say that both these propositions are of great importance, and that it is necessary to consider them carefully in determining whether the legal right of the plaintiff, as patron of the living, has been infringed.

In dealing with them, it will be convenient to take the second proposition first in order. It involves a mixed question of law and fact; and, before its accuracy can be determined, its real meaning must be arrived at. If it be intended only to affirm that but for the refusal of Mr. Cowgill to submit to the defendant's proposal the defendant would have admitted him, this may be true: but the affirmance of the proposition in this form would not avail the plaintiff; who is bound to establish that when the defendant refused Mr. Cowgill, as he did, in fact, he refused him upon a wrong ground. Again, if the proposal of the defendant had been one requiring an undertaking by Mr. Cowgill to do something which did not arise out of his past conduct—a proposal which, considering the special duty the defendant was then discharging, would have been in excess of his authority—a very different question would have arisen. Thus, if the defendant had said, "It is true, Mr. Cowgill, that you have done acts for which I could now refuse to admit you; but I consider that these, even if continued, ought not to outweigh your moral character and your ability and zeal for religion, and your personal fitness for the particular living to which you have been nominated; if, therefore, you will comply with certain conditions, which I feel it my duty to impose—such as the keeping of a curate, or the like—I will admit and institute you;" and upon Mr. Cowgill declining to be bound by these conditions the defendant had said, "Then I shall refuse you," the question that would arise would be very different; and it might then be well argued that the true ground of refusal was not the past acts, but the declining to be bound as to the future with respect to matters foreign to those acts or their consequences as affecting the fitness of Mr. Cowgill. It was argued on behalf of the defendant that, even if the reason for refusing given at the time was a bad one, he must be taken to have refused by virtue of any good reason which then existed, and was afterwards pleaded by him, by analogy to the well-known rule of law, whereby a man may justify the discharge of a servant for any good ground which existed at the time of the discharge, although such ground was not then insisted upon or even known to the employer. This is a sound rule of law, and is based upon the general principle that one who does an act must be taken to do it by reason of the right which is in him, and not by reason of any cause which he may assign; and I am inclined to think that it would properly apply in the present case. But I prefer to rest my decision upon the ground that the real reason for the refusal by the defendant was that Mr. Cowgill had committed the alleged offences, though had Mr. Cowgill agreed to the proposed undertaking the defendant might have admitted him. I may illustrate my view of what occurred thus. A distinguished soldier having committed an offence punishable by death, his sovereign proposes that if he would take the command of an army on foreign service he would give him a free pardon. The soldier declined, and is

executed. Why? Not because he would not take the command, but because he had committed the offence. I am led, therefore, to the conclusion that upon this point my finding in fact and law ought to be for the defendant.

Reverting now to the plaintiff's first proposition—that no sufficient ground for the defendant's refusal to admit and institute the nominee of the patron is shewn by the statement of defence, or the evidence given in support of it—although by the ecclesiastical law the Bishop is judge of the fitness of any clerk presented to a benefice, it is clear that in *quare impedit*, upon the rejection of a patron's presentee, the Bishop's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and the proper tribunal to judge of its soundness. This was so decided by the House of Lords in 1868, in the case of *The Bishop of Exeter* v. *Marshall* (1). The defendant in the present case has by his statement of defence set forth with sufficient certainty in what respect he found Mr. Cowgill to be unfit. It remains, therefore, only to see whether the grounds set forth by the defendant are sufficient in law. If they are so, although the defendant may not have been bound to act upon them, by reason of the judicial discretion which is vested in him, having acted upon them, he has a good defence to the present proceedings.

The ground taken by the defendant's counsel with reference to this part of the case was as follows. They cited cases in which it has been held that the acts done by Mr. Cowgill have been considered offences against the ecclesiastical law, and therefore good cause for deprivation. As to the first of the acts named in the statement of defence, they cited *Hebbert* v. *Purchas* (2) and *Clifton* v. *Ridsdale* (3); as to the second of these acts, they cited *Martin* v. *Maconochie* (4); and as to the third, fourth and fifth the same case at later stages (5), (6), (7). Counsel for the defendant next asserted that all such as are sufficient causes to deprive an incumbent are sufficient to refuse a presentee. This rule approves itself to my mind as rational and intelligible; and it is supported by high authority. It is stated as the law in the resolution of the Judges in *Specot's Case* (8); and it is referred to by many text-writers, including Bishop Stillingfleet (who adds "by the canon law more are allowed"), *Ayliffe's Parergon*, p. 41, *Burn's Ecclesiastical Law*, 9th ed. vol. i. p. 156[a], and *Phillimore's Ecclesiastical Law*, vol. i. p. 417.

Counsel for the plaintiff denied that the defendant's proposition was good *in omnibus*, although they admitted that it would be sound in cases in which the cause of deprivation was one which affected the personal or moral fitness of the clerk.

Before I proceed to consider whether there is any authority for this, a difficulty presents itself *in limine*—namely, how can I, sitting in a temporal Court, do more than enquire whether the act in question is an offence against the ecclesiastical law? If it be an ecclesiastical offence which is good ground for deprivation, how can this Court make a distinction between acts which are wrong by reason of immorality and those which are wrong by reason of disobedience to the law ecclesiastical in matters of vestment or ritual? That there is in fact a distinction cannot be doubted; but when once an offence against the ecclesiastical law has been established which would justify deprivation, then this Court is powerless to enter into the question of degree; and it must be left to the Bishop to consider, as a matter of judicial discretion, not merely what is the character of the act itself, but whether the manner and persistency of its commission are such as

(1) 37 Law J. Rep. C.P. 331; Law Rep. 3 E. & I. App. 17.

(2) 40 Law J. Rep. P.C. 33; Law Rep. 3 P.C. 605.

(3) 46 Law J. Rep. P.C. 27: Law Rep. 2 P.D. 276.

(4) 36 Law J. Rep. Eccles. 25; Law Rep. 2 A. & E. 116.

(5) 38 Law J. Rep. P.C. 1; Law Rep. 2 P.C. 365.

(6) 38 Law J. Rep. P.C. 1; 40 ibid. 1; Law Rep. 2 P.C. 365, and 3 P.C. 409.

(7) 39 Law J. Rep. P.C. 11; Law Rep. 3 P.C. 52.

(8) 5 Co. Rep. 58.

to affect the fitness of the clerk who is presented to him for admission. Many cases might be put which would illustrate this view, but I think it undesirable to say more than is necessary for the decision of the issues before me. It was said, with some force, on behalf of the plaintiff that an act of immorality must, like the ignorance of a clerk, probably affect his general fitness, whereas, looking at the acts complained of against Mr. Cowgill, which are of a purely ritual character, and bearing in mind that he did them while he was curate to Mr. Green and must be supposed to have been acting to some extent under his directions, they do not afford the same ground for inferring that they must render him unfit. This again is not, in my view, matter which can affect the judgment of this Court, though it may properly be addressed to the discretion of the Bishop; and for this reason I think that the defendant did well, having reference to the character of the acts, to interrogate Mr. Cowgill with a view to discover *quo animo* the acts were done, and how far they would be likely to affect the future fitness of Mr. Cowgill should he come to fill the office of rector. The answers given by Mr. Cowgill are clear; and the more they can be pointed to as evidencing an earnest and conscientious frame of mind the more they shew that his past acts would, in all human probability, be continued in future, inasmuch as they were based upon what, according to his notions, is due to God and to his congregation, and that he could not abandon them without betraying the trust committed to him as a minister of the Church.

In order to shake the authority of the resolution in *Specot's Case* (8), counsel for the plaintiff cited the case of *Bell* v. *The Bishop of Norwich* (9), which was decided in Michaelmas Term, 8 & 9 Elizabeth, and before *Specot's Case* (8). It was a case of *quare impedit*, in which the Bishop of Norwich, having refused the patron's presentee, pleaded as a defence that the clerk presented was one whom he ought not by ecclesiastical law to admit, because he commonly haunted taverns and other places and games illegal and prohibited, wherefore, and for divers other like crimes, the clerk was *criminosus*, and so an improper and unfit person to be instituted into the vicarage. By the opinion of all the Judges, this return was held to be insufficient, for all these particular faults specially declared above are not sufficient to make the presentee *criminosus*, because none of them is such a crime as merits a refusal, for they are not *mala in se* but by a prohibition in law. In *March's Cases*, 11, p. 8, the case in *Dyer* (9) was cited, "where the presentee was refused because he was a common haunter of taverns, &c." This was denied by Justice Barckley to be law, in which opinion Justice Jones agreed. It is also to be observed that the case of *Bell* v. *The Bishop of Norwich* (9) was cited in *Specot's Case* (8) immediately before the resolution which is relied on by the defendant. Whether, however, the case be law or not, it does not affect the present argument; because the ground of the decision appears to have been that the Bishop was wrong in refusing for an offence which was criminal only because it was prohibited by statute without going on to enquire to what extent, and in what manner, the presentee had haunted taverns, so as to see whether his so doing affected his fitness as a vicar. It is in this way I find the case dealt with in 1 *Blackstone's Commentaries*, p. 389; and, indeed, it is obvious that to allow such a return by the Bishop to be good would be to enable him to evade the duty which is cast upon him of finding specifically the alleged unlawful acts, and that they are such as to render the presentee unfit. To allege merely that a man haunted taverns, without more, would scarcely seem to indicate that he was unfit to discharge the pastoral office more than if he had been guilty of an offence against the old statutes which required that deceased persons should be buried only in woollen.

Another, and, were it well founded, a more serious argument, presented on behalf of the plaintiff, is that the ground of objection taken by the defendant to Mr. Cowgill is not one of those which are mentioned in the case of *The Bishop of Exeter* v. *Marshall* (1). As I have already said, the decision in that case was grounded upon the insufficiency of the Bishop's plea, because it did not state the person presented to have been in fact unfit, but only

(9) Dyer, 254*b*.

shewed that a Bishop was not so satisfied of his fitness as to give him a special testimonial. It is true, however, that in his opinion to the House of Lords in that case the late Mr. Justice Willes said as follows: "The key to the right decision of this case is the elementary proposition that a patron is entitled effectually to present any fit person—that is to say, a person of the canonical age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established." This opinion is cited by Lord Cranworth with approval in the same case. It cannot, however, having reference to the nature of the question before the House, be treated as containing an exhaustive category of ecclesiastical offences which would justify refusal.

In considering whether the acts done by Mr. Cowgill would have been good ground for deprivation had they been done by a rector, I may say that this was almost admitted to be so by the plaintiff's counsel; at least no authority was cited before me to the contrary. It may be useful, however, in dealing with this part of the case, to refer to the recent authority of *Combe* v. *De la Bere* (10). The actual decision in that case has no immediate bearing upon the present argument, but in the course of his judgment Lord Penzance, when dealing with the sentence of deprivation, said: "It is a sentence . . . . which the necessities of modern times have rarely called for, and the instances in which it has been pronounced have not, in the nature of the offences charged, resembled the case now before me" (in which offences only of a ritual character were charged). "I do not on that account think it is to be doubted that deprivation stands on the same footing as the other censures of the Church, and may be inflicted in any case of a distinct ecclesiastical offence which, in the judgment of the Court, is of a sufficiently serious character in itself, or which is attended with sufficient circumstances of aggravation to require it." He goes on, no doubt, to say that "it is particularly applicable to cases of continuous offences, in which the lesser censures of the ecclesiastical law have been tried without effect." He cites a great many authorities from which it is clear that, if a clerk in orders is disobedient to the lawful canons of the Church, it is good ground of deprivation. In particular, he refers to a case in *Cro. Jac.* p. 37, as follows:—"It appears that all the Justices of England were summoned to the Star Chamber, and the Chancellor asked them whether the deprivation of Puritan ministers by the High Commissioners for refusing to conform themselves to the ceremonies appointed by the late canons was lawful? And they answered that they held it to be lawful, because the King hath the supreme ecclesiastical power, which he hath delegated to the Commissioners, whereby they had the power of deprivation by the common law of the realm; and the statute of 1 Eliz. c. 1. s. 18, which appoints Commissioners to be made by the Queen, doth not confer any new power, but explains and declares the ancient power. And, therefore, they held it clear that the King without Parliament might make orders and constitutions for the government of the clergy, and might deprive them if they obeyed not. This decision involves three propositions—first, that the King may make canons and constitutions binding the clergy without the authority of Parliament (with this the present case is not concerned); secondly, that for breach of the canon law the High Commission Court might well deprive; and, thirdly, that the power of deprivation they had, not by the statute, but in exercise of the ecclesiastical law, by the common law of the realm." He cites also *Caudrey's Case* (11), and, after giving the effect of it, proceeds as follows:—"Here, then, is a distinct decision that the ecclesiastical Courts may properly exercise the power of deprivation in cases where the directions of the Book of Common Prayer for the performance of divine service have not been observed, and to this there are no qualifications added. The resort by the High Commission to the extreme penalty of deprivation, in place of temporary suspension, renders it probable that the offence for which Caudrey was deprived was one that

(10) Law Rep. 6 P.D. 157.

(11) 5 Co. Rep. 1.

involved an obstinate determination not to observe the Book, or other circumstances of aggravation; but the law of the case did not depend on any such circumstances; if it had, Lord Coke would assuredly not have omitted them in setting out the special verdict. It is right also to point out, before leaving this case, that the language of the 23rd section of the 1 Eliz. c. 2, to which the Judges referred, does by implication affirm this right of deprivation; for, speaking of offences against the Act (the chief and most obvious of which would be a non-compliance with the Book of Common Prayer), it reserves to the ecclesiastical Courts the power to punish the same by admonition, excommunication, sequestration or deprivation, and other censures and process, in like form as heretofore has been used in like cases by the Queen's ecclesiastical laws." After citing one other authority, Lord Penzance continues:—"From these authorities it is very evident, I think, that the punishment of deprivation has never been confined to any particular class or character of offences. Drunkenness, contempt, crime, dilapidations, incorrigibility, breach of the canons, disobedience to the ordinary, incapacity, neglect of duties persevered in after warning, failure to observe the Book of Common Prayer; these, with several others, form a catalogue of offences the most diverse in character and varied in gravity. I come to the conclusion, therefore, that it is not the particular character of an ecclesiastical offence which alone warrants the application of the censure, but the gravity of the offence in each particular case, taken in connection with its attendant circumstances, and carefully weighed in the estimation of the Court. For the purpose, however, of the present case, it is not needful that the Court should rely upon any general considerations of this kind, or travel beyond limits within which the sentence of deprivation has been already recognised. For the authorities cited have defined as punishable by deprivation the following four offences—contempt or contumacy, incorrigible disobedience to the ordinary, incorrigible disobedience to the canons of the Church, and failure to observe the Book of Common Prayer."

The last ground that was taken in favour of the plaintiff was as follows:—That, assuming the acts alleged against Mr. Cowgill to have been illegal, they were of such a character, and so done, that it ought not to be inferred that, were he a rector, he would repeat them, inasmuch as what he did he did while he was curate acting under a rector who approved of them; and, further, that they were unchecked either by his rector or his Bishop. If this argument were presented to the Bishop as a ground whereon to rest a lenient view of the case, such as might enable him in the exercise of his judicial discretion to say that, although these acts were done by Mr. Cowgill, they would not, in the opinion of the Bishop, render him unfit, it would certainly be entitled to consideration. As presented in this Court, the argument assumes a double shape—first, that the acts alleged were done by Mr. Cowgill while he was a curate; and, secondly, that they were unchecked by his rector or Bishop—and neither of these is strengthened because it co-exists with the other. Taking the first, that the acts were done by Mr. Cowgill while he was a curate, this, no doubt, is specious; but it does not, in my judgment, alter their legal effect. It is used as if the conduct of Mr. Cowgill ought to be measured as though he had done these acts when he was in a previous state of existence. When this Court comes to consider whether the acts in question are ecclesiastical offences, if once it is established that they were, and that they were done by Mr. Cowgill as an ordained minister in the discharge of the duties of his office, I cannot enquire into the circumstances under which the offences were committed, or ask whether Mr. Cowgill did them *ex mero motu*, or from tender regard to the views and practices of his rector. So, also, as to the second branch of this argument, though it might or might not be advisable or prudent on the part of his rector or Bishop to check him from doing the acts complained of, the fact that they failed to do so does not appear to me to affect the question whether or no they amounted to an ecclesiastical offence.

The gist of the whole question is the fitness of Mr. Cowgill, and the acts complained of are important or otherwise in proportion as they may or not affect his

fitness. The first question, therefore, that would occur to any mind to which the facts were presented would be, Were they so committed by Mr. Cowgill that they would, in all probability, be continued by him should he become rector? Looking to the acts themselves, and to the explanation of them given by Mr. Cowgill himself, it seems to me impossible to say that they are not such as might properly lead the defendant, in the exercise of his discretion, to the conclusion that they tend to render Mr. Cowgill unfit. It is impossible to arrive at this conclusion without noticing that it leads to the result that a Bishop may refuse a clerk presented to him upon grounds relating to acts of ritual which, had they arisen in the case of a beneficed clergyman, would, according at least to modern practice, have been dealt with in the first instance by monition, and not by deprivation. This, however, cannot affect the jurisdiction of the Bishop, although it is an argument for the exercise by him of due caution; whereas, to hold that the Bishop had no jurisdiction would be to decide that, however extreme in form or determined in purpose the past offences against ritual might be, the Bishop could not refuse, but must admit; although it might be obvious that, in accordance with the solemnly expressed intention of the clerk, he would probably, if not certainly, continue a course which must lead to deprivation—a decision which, in my judgment, would be repugnant to reason, and unfair alike to the patron, the presentee and the parishioners.

I have cautiously abstained from saying anything which may be supposed to express an opinion as to the views entertained by Mr. Cowgill, or as to his conduct in carrying them out; but I would add, in conclusion, what is strictly pertinent to the legal question before me, namely, that, however much a difference of opinion upon matters of mere ritual is to be regretted, and however much it might be thought desirable that the rules by which the discipline of the Church in such matters is governed should be wider and more elastic, still, while they exist, it is of the highest importance that they should be dealt with fairly, that the proper rules of construction should be applied to them, and, finally, that the logical results should be loyally carried out.

The verdict and judgment will be for the defendant, with costs.

Judgment for defendant.

Solicitors—C. W. Stevens, for plaintiff; J. J. Garrod, agent for John Burder, Manchester, for defendant.

1884. Feb. 23. } HAMMOND *v.* HOCKING. (ILLINGWORTH *claimant.*)

Bill of Sale—45 & 46 *Vict. c.* 43. *ss.* 7 *and* 9, *and Schedule—Accordance with Form—Agreement for maintaining Security—Production of Receipts for Insurance —Power to seize Chattels.*

A bill of sale, given to secure a debt of the grantor, contained a covenant by the grantor to insure and keep insured the chattels assigned in a sum equal to the sum secured, and forthwith after every payment of premiums produce and, if required, deliver to the grantee the receipt, and a clause empowering the grantee, subject to the Bills of Sale Act of 1882, *to seize the chattels on breach:*—Held, *that the bill of sale was not void under the Act of* 1882, *s.* 9.

This was an appeal (by motion) from the Nottingham County Court in an interpleader issue between an execution creditor and a claimant under a bill of sale, the facts (so far as they are material) being as follows:—

The bill of sale was executed on the 11th of July, 1883, by the execution debtor, Hocking, in favour of one Stevenson, who transferred the same to the claimant. The bill of sale, which was a bill of sale assigning certain chattels in and about a house, shop and premises of the grantor, by way of security for a debt of the grantor, contained a covenant by the grantor that he would "at all times during the continuance of the security duly pay all rent, rates and taxes payable in respect of the said house, shop and premises, and also all premiums and other sums necessary for insuring and keeping

insured the said chattels and things against loss or damage by fire in a sum equal to the said principal sum" thereby "secured, and forthwith after every payment in respect of such insurance produce and, if required, deliver to" the mortgagee "the receipt or voucher for the same"; and contained also a clause saying that, "subject to the provisions of the Bills of Sale Act (1878) Amendment Act, 1882, the said chattels and things" might "be seized and taken possession of by" the mortgagee if the grantor should "make default in . . . . the performance of any covenant or agreement on his part" therein contained, or if the grantor should without reasonable cause fail to produce to the mortgagee, upon demand in writing by him, his last receipts for rent, rates and taxes. The bill of sale concluded with a proviso in the words of the concluding proviso (set out below) in the form scheduled to the Act of 1882 (1). On behalf of the execution creditor objection was taken to the bill of sale as bad by reason of the covenant by the grantor to produce receipts for insurance, and deliver them, if required, to the grantee, citing *Davis* v. *Burton* (2). The County Court Judge overruled the objection, and gave judgment for the claimant.

C. Gould, for the execution creditor.—The covenant as to producing receipts for insurance, there being a power to the grantee to seize the chattels on breach of any covenant by the grantor, renders the bill of sale void under the Act of 1882, s. 9 (1). The Act is infringed, as in *Davis* v. *Burton* (2). The covenant, by its stringency, if not otherwise, goes beyond the Act (1). The Act, by section 7, sub-section 4 (1), provides that a grantee is not to have power to seize for non-production of receipts for rent, rates and taxes, unless there has been a demand in writing, and the non-production is without reasonable excuse; whilst here there is to be production of receipts for insurance without any demand whatever, and whether there be or be not a reasonable excuse for non-production, and forthwith, and the receipts are, if required, to be delivered to the grantee.

Stanger, for the claimant, was not heard.

CAVE, J.—This point arises under an enactment passed in the year 1882, in order to protect a borrower on the security of a bill of sale from oppression (1). In applying the Act we must, on the one hand, have due regard to the apparent intentions of the Legislature; but, on the other hand, we must not import needless technicality into its application.

The Act (1) contemplates that the parties to a bill of sale may have agreements for the maintenance of the security. And insurance of the chattels against fire is an obvious point for the parties to consider. This bill of sale does accordingly contain a covenant in relation thereto. That covenant is as follows: [his Lordship read it.] Mr. Gould contends that, inasmuch as that covenant goes beyond what the Act provides as to receipts for rent, rates and taxes, the Act is infringed. There is, however, I think, a clear difference between the case of rent, rates and taxes, and that of insurance against fire. Promptitude is more necessary in the latter case than in the former. It is reasonable, therefore, to have a more stringent clause as to the production of receipts for payments in

(1) The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), enacts—

Section 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule. . . ."

The form in the schedule has the following:—"'And the said'" grantor "'doth also agree with the said'" grantee "'that he will' [here insert terms as to insurance, payment of rent or otherwise, which the parties may agree to for the maintenance or defeasance of the security]. 'Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said'" grantee "'for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882.'"

Section 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—(1) If the grantor shall make default . . . . in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security; . . . (4) if the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes. . . ."

(2) 52 Law J. Rep. Q.B. 334, 636; Law Rep. 10 Q.B. D. 415; ibid. 11 Q.B. D. 537.

respect of insurance; and, having regard to that consideration, and to the fact that it is the person entering into the covenant (and not the covenantee) who receives notice from the insurance office of premiums falling due, it appears to me reasonable that the mortgagor should, as he does by this covenant, bind himself to pay the premiums, and immediately after every payment produce, without demand, the receipts to the mortgagee. I am of opinion that the objection taken was rightly overruled.

SMITH, J.—I am of the same opinion. Applying the language of the Master of the Rolls in *Davis* v. *Burton* (2), the question is whether anything substantial has been added to or subtracted from the model bill of sale given in the schedule to the Act of 1882 (1). What do we find? [His Lordship stated the facts.] I think that nothing substantial has been added or subtracted. The bill of sale is not inconsistent with itself or contrary to the Act.

Appeal dismissed (3).

Solicitors—Jaques, Layton & Jaques, agents for Lancaster & Wright, Bradford, for the execution creditor; J. H. Lee, agent for W. H. Stevenson, Nottingham, for the claimant.

1883. Dec. 14. } STEELE *v.* THE SUTTON GAS COMPANY.

Company—Companies Clauses Consolidation Act, 1845 (8 *Vict. c.* 16), *s.* 108—*Power to Auditors to employ Accountants—Employment by one of Co-auditors.*

One of co-auditors of a company incorporated by a Special Act employed an accountant to assist in auditing accounts of the company, and sought to recover from the company, under the Companies Clauses Consolidation Act, 1845 (8 *Vict. c.* 16), *s.* 108, *the expense of so doing*:—Held, *that he was entitled to recover, notwithstanding the non-concurrence of the co-auditor.*

This was an appeal, by motion, from a judgment of a County Court Judge in favour of the plaintiff in an action brought to recover the sum of 15*l.* 15*s.*, the material facts being as follows:—

The defendants were a company incorporated by a special Act. The plaintiff was one of two auditors of the company. The plaintiff considered it necessary to have the assistance of an accountant in auditing certain accounts of the company, but his co-auditor refused to join in employing such accountant. The plaintiff consequently employed an accountant without the concurrence of his co-auditor, and paid him the sum of 15*l.* 15*s.*, which the action was brought to recover.

The County Court Judge, holding that the power given by the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), s. 108 (1), to auditors to employ accountants, enabled one of co-auditors to employ an accountant without the concurrence of his co-auditor, gave judgment for the plaintiff for the amount claimed. A rule having been obtained on behalf of the defendants calling upon the plaintiff to shew cause why that judgment should not be set aside and a new trial had, or judgment entered for the defendants,

Glenn, for the plaintiff, shewed cause.—One of co-auditors has power, under 8 & 9 Vict. c. 16. s. 108 (1), to employ an accountant without the concurrence of his co-auditor. The word "auditors," in section 108 (1), must be read distributively. The language of section 107 is that "it shall be the duty of such auditors to receive from the directors the . . . . accounts and balance sheet . . . . and to examine the same"; but each auditor clearly must examine the accounts independently of his co-auditor, and section 108 (1) is no more to be read as conferring merely a joint, and not a several power, than section 107 is to be read as

(3) Leave to appeal was refused.

(1) Section 108: "It shall be lawful for the auditors to employ such accountants and other persons as they may think proper, at the expense of the company, and they shall either make a special report on the said accounts, or simply confirm the same."

By section 3, words in the Act importing the singular number only shall include the plural, and words importing the plural only shall include the singular, unless there be something in the subject or context repugnant to such construction.

Steele v. *The Sutton Gas Co.*

imposing only a joint, and not a several duty. Again, section 108 (1) says that "they" may make a special report; but it cannot be contended that the auditors may not each make a special report. The interpretation put upon the Act by the County Court Judge is the reasonable interpretation.

J. D. Fitzgerald, in support of the rule.—The interpretation which has been put upon the Act is strained and unreasonable. Section 101 contemplates that, if so prescribed by the special Act, there may be more than two auditors. Can it be contended that each auditor, no matter how many auditors there may be, is to have power to employ an accountant at the expense of the company?

HUDDLESTON, B.—I am of opinion that the decision of the County Court Judge was right. The *prima facie* meaning of section 108 of the Companies Clauses Consolidation Act, 1845, may be that which the defendants' counsel has sought to attach to it; but I have come to the conclusion that the true construction is that which the plaintiff's counsel has contended for. It can hardly be contended that it is not open to each of two or more auditors to make a special report if the auditors differ, although section 108 (1) says "they" may make a special report; and it seems to me reasonable that the word "auditors," in section 108 (1), should equally be read as applicable to the auditors severally.

STEPHEN, J., concurred.

Rule discharged (2).

Solicitors—Foss & Ledsam, for plaintiff; Tyrrell, agent for J. Merrick Head, Reigate, for defendants.

(2) Leave to appeal was refused.

[IN THE COURT OF APPEAL.]

1883. Dec. 12. } THE BARONESS WENLOCK *v.* THE RIVER DEE COMPANY.*

Practice—Referee—Power to make peremptory Appointment for proceeding with Reference—Order XXXVI. rule 48.

A referee, whether official or special, and whether he has to try a matter or report thereon, has power, subject to the control of the Court, to peremptorily appoint a day for the hearing of the reference, and, in the absence of either party, to proceed with the same.

This was an application made on behalf of the defendants to the Court to fix a day for proceeding with a reference which the Court of Appeal had directed, in order that a special referee might report as to the amount of interest due upon certain mortgages. The parties having failed to agree upon a day, the special referee was of opinion that he had no power under Order XXXVI. rule 48 to fix a day.

Davey, Q.C., and *Kirby*, for the defendants, cited the Judicature Act, 1873, sections 56 and 57, Order XXXVI. rules 48 and 57, and *Walker* v. *Bunkell* (1).

C. H. Anderson, for the plaintiff.

BRETT, M.R.—We are of opinion, after consulting the members of the other division of the Court of Appeal, that it is a necessary implication of the powers of a referee, whether official or special, and whether he has to try the matter or to report, that he has power, subject to the control of the Court, to give a peremptory appointment for the hearing of the reference, and, in case of default of appearance by either party, to proceed with the reference in his absence.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Application refused.

Solicitors—Emmet, Son & Stubbs, agents for Leeman, Wilkinson & Co., York, for plaintiff; Ashurst, Morris, Crisp & Co., for defendants.

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) 52 Law J. Rep. Chanc. 596; Law Rep. 22 Ch. D. 722.

1883. Dec. 7. BRADLAUGH *v.* GOSSETT.

Parliament—House of Commons—Privilege—Resolutions and Orders as to internal affairs—Jurisdiction of the High

tion will lie against an officer of of Commons for acts done under of the House, with the execution is charged by a resolution of self, although such resolution member of the House to do by the law of the land he has a to do.

The Court will not enquire into the legality of a resolution of the House in respect of its internal discipline and the conduct of its own members.

This was a demurrer to a statement of claim, by which the plaintiff claimed an injunction to restrain the Serjeant-at-Arms from enforcing an order of the House of Commons, and a declaration that the said order was void.

The statement of claim set forth that on the 4th of May, 1883, the plaintiff, having been duly elected to serve in the House by the burgesses of the county of Northampton, required the Speaker to call him to the table at the proper time for the purpose of taking the oath as prescribed by law; that the Speaker failed and neglected to call him to the table as demanded; that the plaintiff has not taken the oath which he is required by law to take; and unless he has free and uninterrupted access to the House he will continue to be unable to take, and will be prevented from taking, the oath, and complying with the laws; that on the 9th of July, 1883, the House passed a resolution in the following terms: "That the Serjeant-at-Arms do exclude Mr. Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House;" that a copy thereof was served on the plaintiff, who, on the 10th of July, 1883, wrote a letter to the Speaker which contained these words: "I engage not to disturb the proceedings of the House, but propose to present myself pursuant to statute, and in exact accordance with the Standing Orders under the statute, for the purpose of taking my seat in the manner therein prescribed;" that the Serjeant-at-Arms replied, "I beg to inform you that it will be my duty, in obedience to the order of the House, to exclude you from the House until otherwise instructed by the House or by the Speaker;" that the plaintiff again wrote to the Speaker, who, in reply, said that the exclusion of the plaintiff must last until he engaged not to attempt to take the oath in disregard of the resolution of the House; that on the 3rd of August, 1881, the plaintiff had gone to the outer door of the House for the purpose of entering and taking his seat as a duly elected member and entitled to sit; that the deputy Serjeant-at-Arms, with others under him, assaulted him and forcibly ejected him from the precincts of the House, and that the plaintiff feared and had reasonable grounds for such fears, that the Serjeant-at-Arms would carry out his threat to exclude him from the House, and that he would use force for the purpose, and thereby prevent him from complying with the law. The plaintiff therefore claimed to have it declared that the order contained in the resolution was one beyond the power and jurisdiction of the House to make, and that it is void and of no effect, and claimed an order of the Court that the Serjeant-at-Arms be restrained from enforcing the order and preventing the plaintiff from entering the House and taking the oath as a member. The defendant demurred to this statement of claim on the ground that it did not state any matter for which an action could be maintained, or ask for any relief which could be by law given in the action.

The Attorney-General (*Sir Henry James*) (with him *R. S. Wright*), in support of the demurrer.—There is no jurisdiction to restrain the Serjeant-at-Arms or declare the resolution void.

The Plaintiff in person.—There are precedents of injunctions granted where illegal acts have been done or threatened, and decisions that an illegal act may not be done under shelter of the order of the House. The Serjeant exceeded his duty, as an engagement has been given "not further to disturb the proceedings of the House." The right to sit is admitted on the pleadings. Though the order is

as to the internal affairs of the House, it is submitted that the injunction can be granted without any expression of opinion as to the order itself. It is contended that the Court will and must examine whether the order is within the jurisdiction of the House. The House by statute has only power to make regulations as to taking and subscribing the oath by standing order, and in no other manner. The resolution set out was not a standing order, and, where a duty is cast on the House by statute, there is no dispensatory power by resolution; that would be to supersede the law of the land by resolutions. This order is against the law of Parliament. The only way of taking away a right is by statute. If the defendant sets up the order of the House as a defence, the Court can enquire into the legality of that order, as it would if the plaintiff were not a member. This is not an order of discipline or punishment, but expressly intended, as shewn by the uncontradicted paragraphs 5 and 9 of the statement of claim, to prevent the plaintiff taking the oath. There had been no disturbance, although the word "further" appears. The House, therefore, claims a right to prevent any one taking the oath, although by 5 Ric. 2. stat. 2. c. 4, a member is compellable to do what is necessary to take his seat; and the order of the House would be no answer to an information filed against a member for not taking his seat. This is not, like a resolution for relief from attendance, a leave and licence; this is a privatory resolution preventing a member doing that which by the statute he is required to do. If there is any disqualification even, the House ought not, since the appointment of election Judges, to take cognisance of it, and the only way of declaring a member disqualified is by a new writ. The only duty of the House is to see the oath administered; it has no power to administer it, though it might punish by expulsion anything done in the manner of taking the oath. In fact the House did on the 1st of July, 1880, make a standing order; but the order of the 9th of July, 1883, was sessional and has expired by effluxion, yet the Serjeant-at-Arms says he will keep out the plaintiff until he undertakes as required. It is the privilege and right of a member whose return is unimpeached to take the oath and his seat.

The following cases and authorities were cited by the plaintiff:—*Barnardiston* v. *Soames* (1), *The King* v. *Knollys* (2), *Fitz-Harris's Case* (3), *Burdett* v. *Abbott* (4), *Stockdale* v. *Hansard* (5), *Benyon* v. *Evelyn* (6), *The Duchess of Somerset* v. *The Earl of Manchester* (7), *Clarke* v. *Bradlaugh* (8), 6 Hen. 8. c. 16, *Erskine May's Parliamentary Practice* (9), *Axholme's Precedents* (10), 4 *Coke's Instit.* ch. 1. p. 1, Parliamentary Oaths Act, 1868 (29 Vict.), c. 19. s. 3 (11), *Ashby* v. *White* (12), *The Queen* v. *Patey* (13), *Middleton* v. *Wynne* (14), *Lord Shaftesbury's Case* (15), *Howard* v. *Gosset* (16), *Shirley* v. *Fagg* (17), *Commons Journal* (18), *The Queen* v. *Stone* (19) and *Viscount Clancarty's Case* (20).

The Attorney-General (*Sir H. James*), in reply.—If the House of Commons should come to a resolution to expel or not admit a member without cause there is no jurisdiction to enquire into it. The House of

(1) 6 St. Tri. 1063.
(2) 2 Salk. 509.
(3) 8 St. Tri. 223; 1 Com. Journ. 26 March, 1681.
(4) 14 East, 1.
(5) 9 Ad. & E. 162.
(6) T. 14, Car. 2. Rol. 2558.
(7) Prynne's Reg. pt. 4, 1214.
(8) 50 Law J. Rep. Q.B. 342, 678; Law Rep. 7 Q.B. D. 38.
(9) 9th ed. pp. 210, 228, 724, 725.
(10) 2nd ed. vol. ii. p. 151.
(11) 29 Vict. c. 19. s. 3: "The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every member of the House of Peers, at the table in the middle of the said House, before he takes his place in the said House, and whilst a full House of Peers is there with their Speaker in his place; and by every member of the House of Commons at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting, with their Speaker in his chair, at such hours and according to such regulations as each House may by its standing orders direct."
(12) 2 Ld. Raym. 938; 3 Salk. 19; 6 Mod. Cas. 65.
(13) 2 Ld. Raym. 1105.
(14) 1 Wils. 127.
(15) 1 Mod. 144; 6 St. Tri. 1270.
(16) 10 Q.B. Rep. 359; 14 Law J. Rep. Q.B. 367.
(17) 6 St. Tri. 1121.
(18) Vol. i. p. 435; vol. ix.
(19) 17 Jur. 1106.
(20) C. XIX. Hans. 630.

Commons is absolute and irresponsible as to the conduct of its own members within its walls—*Entick* v. *Carrington* (21); see the judgment of Lord Camden, C.J., at page 1047. "Whatever is done within the walls of a popular assembly must pass without comment elsewhere"—*per* Lord Denman, C.J., in *Stockdale* v. *Hansard* (5), (at page 162); Littledale, J. (5), and Patteson, J. (5), (at page 195), to the same effect; and Coleridge, J., says, "Of no act done there can any tribunal take cognisance but the House itself" (5) (at page 228).

The resolution cannot be treated as a nullity; and the reasons for which it was passed cannot be enquired into here.

The following considered judgments were delivered on February 11, 1884:—

LORD COLERIDGE, C.J.—It was the importance of this case as to the issues which it raised, and the great dignity of the House of Commons, whose action is, in fact, questioned in the person of the Serjeant-at-Arms, rather than any difficulty in the legal questions involved or doubt as to how they should be answered, which led me to desire that the judgment pronounced on it should be deliberate. The same reasons led me to think it fit to express my own judgment separately, though after reading the judgment of my learned brother I feel that the subject is exhausted.

The facts and the pleadings which state them raise the question whether on the assumption that the resolution of the House of Commons forbade a member of the House, within the walls of the House itself, to do something which by the law of the land he had a right to do, such a resolution is one which the House of Commons has a right to pass; and whether, if it has not, this Court can enquire into the right and allow an action to be maintained by a member of the House against the officer of the House charged by resolution of the House itself with the execution of its order.

The plaintiff argued his own case, and argued it with abundant learning and ability, but he admitted that with all his research he had not found a single precedent for his action, and that he had found many distinct and weighty *dicta* of great Judges in former days to the effect that no such action could be maintained. Nor, wide as is the range of topics more or less connected with the point at issue, and numerous as are the authorities collected and commented on in the leading cases on the subject, does it seem to me that the questions really to be decided are more than elementary and such as must be decided mainly on principle. In this, as in so many matters of practical concern, difficulties are created by the laying down of principles in terms so wide and general that, although logic may justify them, the sense and feeling of men impose upon them in fact limitations, which are said, not altogether untruly, to be sometimes inconsistent with the principle they are supposed to admit. For example, it seems to be conceded that a resolution of the House of Commons only (and what is true of one House of Parliament is true of the other) cannot change the law of the land. Mr. Justice Patteson and Mr. Justice Coleridge—the former especially—put this point with great force in their judgments in *Stockdale* v. *Hansard* (5); and yet, if the House of Commons is—as for certain purposes and in relation to certain persons it certainly is, and is on all hands admitted to be—the absolute judge of its own privileges, it is obvious that it can, at least for those purposes, and in relation to those persons, practically change or practically supersede the law.

Again, there can be no doubt that in an action between party and party brought in a Court of law, if the legality of a resolution of the House of Commons arises incidentally, and it becomes necessary to determine whether it be legal or no for the purpose of doing justice between the parties to the action, in such a case the Courts must entertain and must determine that question. Lord Ellenborough expressly says so in *Burdett* v. *Abbott* (4), and Mr. Justice Bayley seems to assume it at page 161. All the four Judges who gave judgment in *Stockdale* v. *Hansard* (5) assert this in the strongest terms. That case indeed was an illustration of this necessity. The Attorney-General, Sir J. Campbell, could undoubtedly have acceeded at Nisi Prius upon the facts of the case without

(21) 19 St. Tri. 1067.

raising the question of privilege upon which the arguments and the judgments were delivered. But for reasons perfectly well understood at the time, he forced Lord Denman, who tried the cause, to give the ruling which he was determined to question. It is perhaps not to be regretted when the arguments and the judgments are remembered; but I see no answer to the statements of the Judges at pages 195 and 243, that when a question is raised before the Court, the Court must give judgment on it according to its notions of the law, and not according to a resolution of either House of Parliament. Cases may be put, cases have been put, in which, did they ever arise, it would be the plain duty of the Court at all hazards to declare a resolution illegal and no protection to those who acted under it. Such cases might by possibility occasion unseemly conflicts between the Courts and the Houses; but, while I do not deny that as a matter of reasoning such things might happen, it is consoling to reflect that they have scarcely ever happened in the long centuries of our history, and that in the present state of things it is but barely possible that they should ever happen again.

Alongside, however, of these propositions, for the soundness of which I should be prepared most earnestly to contend, there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is said or done within the walls of Parliament cannot be enquired into in a Court of law. On this point all the Judges in the two great cases which exhaust the learning of the subject—*Burdett* v. *Abbott* (4) and *Stockdale* v. *Hansard* (5)—are agreed and are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord Ellenborough, "they would sink into utter contempt and inefficiency without it." Whether in all cases and under all circumstances the Houses are the sole judges of their own privileges in the sense that a resolution of either House on this subject has the same effect for a Court of law as an Act of Parliament is a question not now necessary to determine. No doubt to allow any review of Parliamentary privilege by a Court of law may lead, has led, to very grave complications, and might in many supposable cases end in the privileges of the Commons being determined by the Lords. But to hold the resolutions of either House absolutely beyond enquiry in a Court of law may land us in conclusions not free from grave complication too. It is enough for me to say that it seems to me that in theory the question is extremely hard to solve; in practice it is not very important, and at any rate does not now arise. On the question that does arise, if cases are required, there is a remarkable one to be quoted regarding each House—*Lord Shaftesbury's Case* (15)—in which the Court of King's Bench altogether declined jurisdiction to enquire as to what had passed in the House of Lords; and the case of Sir John Elliot and his fellows, reported fully in *Cro. Car.* That was a very remarkable case, for no doubt Sir John Elliot, Mr. Valentine and Mr. Hollis had held the Speaker in the chair by main force to prevent his adjourning the House before a motion had been made. They were sued in the King's Bench. They pleaded by demurrer to the jurisdiction that the offences (if any) had been committed in Parliament, and ought to be there examined and punished, and not elsewhere. The demurrer was overruled, and they were heavily fined and imprisoned. Sir John Elliot was killed by the rigours of his imprisonment; Mr. Valentine died; but Mr. Hollis survived; and in 1667 the judgment of the King's Bench was reversed by the House of Lords on the ground that it was an illegal judgment and against the freedom and privilege of Parliament. These cases seem directly in point, and we could not give judgment for the plaintiff in this action without overruling them.

I need not discuss at any length the fact that the defendant in this case is the Serjeant-at-Arms. The Houses of Parliament cannot act by themselves in a body. They must act by officers, and the Serjeant-at-Arms is the legal and recognised officer of the House of Commons to execute its orders. I entertain no doubt that as the House had a right to decide on the subject-matter, have decided it, and have ordered their officer to give effect

to their decision, he is protected by the decision. They have ordered him to do what they have a right to order, and he has obeyed them. It is said that in this case the House of Commons has exceeded its legal powers because it has resolved that the plaintiff shall not take an oath which he has a right to take, and the threatened force is force to be used in compelling obedience to a resolution in itself illegal. But there is nothing before me upon which I should be justified in arriving at such a conclusion in point of fact. Consistently with all the statements in the case, it may be that the plaintiff insisted on taking the oath in a manner or under circumstances which the House had a clear right to object to or prevent. Sitting in this seat, I cannot know one way or the other. But even if the fact be as the plaintiff contends, it is not a matter into which this Court can examine. If injustice has been done, it is an injustice for which the Courts of law afford no remedy. On this point I agree with and desire to adopt the language used by my brother Stephen. The history of England and the resolutions of the House of Commons itself shew that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy there be, lies not in actions in the Courts of law (see on this subject the observations of Lord Ellenborough and Mr. Justice Bayley in *Burdett* v. *Abbott* (4)), but by an appeal to the constituencies whom the House of Commons represents.

It follows that this action is against principle and is unsupported by authority, and that therefore the demurrer must be allowed, and that there must be judgment for the defendant.

STEPHEN, J.—The demurrer admits for the purposes of our decision the truth of the matters stated in the statement of claim. In a few words they are as follow:—"The resolution of the House of Commons of the 9th of July, 1883, read with the correspondence between the Speaker and Mr. Bradlaugh, shews that, for reasons which are not before us, the House of Commons resolved that Mr. Bradlaugh, who had been duly elected member for Northampton, should not be permitted to take the oath prescribed by law for members duly elected, and that he should be excluded, if necessary by actual force, from the House, unless he would engage not to attempt to do so." We are asked to declare this order void, and to restrain the Serjeant-at-Arms from enforcing it.

I may observe, before considering this question, that but for the amendment made at the hearing it might have been that I at least should have felt bound to decide the case on a much narrower ground than that on which I think we ought to deal with it. Taken by itself the order of the 9th of July states nothing except that the House had by resolution excluded a member, who in the judgment of the House had disturbed its proceedings, till he undertook not further to disturb it. It is obvious that we could not interfere with what might be a mere measure of internal discipline. The order as it stands is consistent with the supposition that Mr. Bradlaugh on presenting himself to take the oath had in some way misconducted himself, and that the House had ordered him to be excluded till he promised not to repeat his misconduct. With such a measure of internal discipline we obviously could not interfere. The correspondence with the Speaker certainly sets the matter in a different light. I cannot read the statement of claim as asserting less, or interpret the demurrer as admitting less, than what I have already stated, and this raises the question which the parties probably wished to have decided in a very broad way. The legal question which this statement of the case appears to me to raise for our decision is this. Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and in order to enforce its prohibition directs its executive officer to exclude him from the House, by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own

internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable. Many authorities might be cited for this principle, but I will quote two only. The number might be enlarged with ease by reference to several well-known cases. Blackstone says (22):—"The whole of the law and custom of Parliament has its original from this one maxim, 'That whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere.'" This principle is restated nearly in Blackstone's words by each of the Judges in the case of *Stockdale* v. *Hansard* (5). As the principal result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain, in case of need, the extent of the privileges of the House, and to deny emphatically that the Court is bound by a resolution of the House declaring any particular matter to fall within their privilege, these declarations are of the highest authority. Lord Chief Justice Denman, says (p. 114):—"Whatever is done within the walls of either assembly must pass without question in any other place." Mr. Justice Littledale says (p. 162): "It is said the House of Commons is the sole judge of its own privileges, and so I admit, so far as the proceedings in the House and some other things are concerned." Mr. Justice Patteson said:—"Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is said or done in either House should not be liable to examination elsewhere." Mr Justice Coleridge said:—"That the House should have exclusive jurisdiction to regulate the course of its own proceedings and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity." Apply the principle thus stated to the present case. We are asked to declare an order of the House of Commons to be void, and to prevent its execution in the only way in which it can be executed—on the ground that it constitutes an infringement of the Parliamentary Oaths Act. This Act requires the plaintiff to take a certain oath. The House of Commons have resolved that he shall not be permitted to take it. Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other. How can we interfere without violating the principles just referred to? Surely the right of the plaintiff to take the oath in question is "a matter arising concerning the House of Commons," to use the words of Blackstone. The resolution to exclude him from the House is a thing "done within the walls of the House," to use Lord Denman's words. It is one of those "proceedings in the House of which the House of Commons is the sole judge," to use the words of Mr. Justice Littledale. It is "a proceeding of the House of Commons in the House," and must therefore "be entirely free and unshackled," in the words of Mr. Justice Patteson. "It is part of the course of its own proceedings," to use the words of Mr. Justice Coleridge, and is therefore "subject to its exclusive jurisdiction."

These authorities are so strong and simple that there may be some risk of weakening them in adding to them. Nevertheless, the importance of the case may excuse some further exposition of the principle on which it seems to me to depend. The Parliamentary Oaths Act prescribes the course of proceeding to be followed on the occasion of the election of a member of Parliament. In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act; for if the resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must, of course, face this supposition, and give our decision upon the hypothesis of its truth; but it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute law. The more decent, and, I may add, the more natural and probable, supposition is that, for reasons which are not before us, and which we

(22) 1 Black Com. 163.

are therefore unable to judge of, the House of Commons considers that there is no inconsistency between the Act and the resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do; but whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute so far as the regulation of its own proceedings within its own walls is concerned, and that even if that interpretation should be erroneous this Court has no power to interfere with it, directly or indirectly.

This view of the matter is well illustrated by another part of the Act. By section 4 certain persons are permitted to make a declaration or affirmation instead of taking an oath. The question whether this applied to persons permitted, by 32 & 33 Vict. c. 68. s. 4, to make a promise instead of taking an oath, arose in the case of the plaintiff himself. It was considered by the House of Commons, and the House took a course which left the interpretation of the enactment to the Courts. It permitted the plaintiff to make the declaration, but declared that it did not intend to interfere with his liability to the statutory penalty if he did so. He made the declaration, took his seat accordingly, and was sued for the penalty. Though the proceedings finally terminated in his favour, they established the proposition that section 4 of the Parliamentary Oaths Act did not authorise him in making a statutory declaration in lieu of taking an oath.

This case appears to me to illustrate exactly the true relation between the House of Commons and this Court as regards the interpretation of statutes affecting them and the effect of their resolutions on our proceedings. A resolution of the House permitting Mr. Bradlaugh to take his seat on making a statutory declaration would certainly never have been interfered with by this Court. If we had been moved to declare it to be void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, and had attempted by resolution or otherwise to protect him against an action for penalties, it would have been our duty to disregard such resolution, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the statute. Suppose, again, that the House had taken the view of the statute ultimately arrived at by this Court, that it did not enable Mr. Bradlaugh to make the statutory promise, we should certainly not have entertained an application to declare their resolution to be void. We should have said that for the purpose of determining on a right to be exercised in the House itself, and in particular the right of sitting and voting, the House, and the House only, could interpret the statute; but that as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court irrespective of the House. This view of the subject is, perhaps, most simply and completely illustrated by the 4th section, but it seems to me to apply equally well to the 3rd, and I therefore think that we ought not to make the declaration asked for.

I may observe, in conclusion, that, apart from these considerations, I should in any case whatever feel a reluctance almost invincible to declaring a resolution of the House of Commons to be beyond the powers of the House and to be void. Such a declaration would in almost every imaginable case be unnecessary and disrespectful. I will not say that extraordinary circumstances might not require it, because it is impossible to foresee every

event which may happen. It is enough to say that the circumstances which would justify such a declaration must be extraordinary indeed, and that even if relief had to be given in this case I should think it sufficient to restrain the Serjeant-at-Arms from acting on the order of the House. I do not dwell upon this however, as I wish to put my judgment on the plain and broad ground already stated.

That part of the prayer of the statement of claim which asks us to restrain the Serjeant-at-Arms from using force to prevent the plaintiff from entering the House may be disposed of in a few words. The order is to exclude the plaintiff from the House, and we cannot suppose that this means more than that the plaintiff is to be prevented by the use of such force as may be absolutely necessary for the purpose from entering such parts of the Houses of Parliament as the order applies to. We should not be warranted either in law or by the use of common experience in supposing that anything else was intended. If, however, this only is intended, I am of opinion that the use of such force is strictly justifiable. Every private man has the right of preventing a stranger from entering his house by such force, and of authorising others to act for him if he is unable or unwilling to act for himself; and to say that the House has by law power to exclude one of its members from the House, but has not the power to direct the use of such force for that purpose, would be contradictory.

Before leaving this part of the subject I may observe that, in my judgment, the case before us differs widely from a possible case suggested in argument in *Burdett* v. *Abbott* (4) as to the effect of an order by the House of Commons to put a member to death, or to inflict upon him bodily harm. Of such a case it is enough to say, as Lord Ellenborough said, that it will be time to decide it when it arises. The only force which comes in question in this case is such force as any private man might employ to prevent a trespass on his own land. I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice. One of the leading authorities on the privilege of Parliament contains matter on this point which shews how careful Parliament has been to avoid even the appearance of countenancing such a doctrine. This is the case of Sir J. Elliot, Denzil, Hollis and others, of which a complete history is given in 3 *St. Tri.*, 294–336. In this case the defendants were convicted in 1629, on an information before the Court of King's Bench, for seditious speeches in Parliament, and also for an assault on the Speaker in the chair. They pleaded to the jurisdiction that these matters should be enquired into in Parliament and not elsewhere, and their plea was overruled. In 1667 this judgment was reversed upon writ of error—one error assigned being that the speaking of the seditious words and the assault on the Speaker were made the subject of one judgment, whereas the seditious speech, if made in Parliament, could not be enquired into out of Parliament, even if the assault upon the Speaker could be tried in the Court of King's Bench. Hence there should have been two separate judgments. This case is the great leading authority, memorable on many grounds, for the proposition that nothing said in Parliament by a member as such can be treated as an offence by the ordinary Courts; but the House of Lords carefully avoided deciding the question whether the Court of King's Bench could try a member for an assault on the Speaker in the House.

The plaintiff argued his own case before us at length. It is due to him to state the reason why his arguments do not convince me. He referred to a great number of authorities, but his argument was in substance short and simple. He said that the resolution of the House of Commons was illegal, as the House had no power to alter the law of the land by resolution; and, admitting that the House has power to regulate its own procedure, he contended that in preventing him from taking his seat the House went beyond matters of internal regulation and procedure, as they deprived both him and the electors of Northampton of a right recognised by the law which ought to be protected by the law, and so inflicted upon him and them wrongs which

would be without a remedy if we failed to apply one. I think that each part of this argument requires a plain, direct answer. It is certainly true that a resolution of the House of Commons cannot alter the law. If it were ever necessary to do so this Court would assert this doctrine to the full extent to which it was asserted in *Stockdale* v. *Hansard* (5). The statement that the resolution of the House of Commons was illegal must, I think, be assumed to be true for the purposes of the present case. The demurrer for those purposes admits it. We decide nothing unless we decide that even if it is illegal, in the sense of being opposed to the Parliamentary Oaths Act, it does not entitle the plaintiff to the relief sought. This admission, however, must be regarded as being made for the purposes of argument only. It would, as I have already said, be wrong for us to suggest or assume that the House acted otherwise than in accordance with its own view of the law; and as we know not what that view is, nor by what arguments it is supported, we can give no opinion upon it. I do not say that the resolution of the House is the judgment of a Court not subject to our revision, but it has much in common with such a judgment. The House of Commons is not a Court of justice, but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a Judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms, and it would be more intelligibly and correctly stated if it were reversed so as to stand "where there is no legal remedy there is no legal wrong." The assertion that the resolution of the House goes beyond matter of procedure, and that it does in effect deprive both Mr. Bradlaugh himself and his constituents of legal rights of great value, is undoubtedly true if the word "procedure" is construed in the sense in which we speak of civil procedure and criminal procedure, by way of opposition to the substantive law which systems of procedure apply to particular cases. No doubt the right of the burgesses of Northampton to be represented in Parliament, and the right of their duly elected representative to sit and vote in Parliament and to enjoy the other rights incidental to his position upon the terms provided by law, are in the most emphatic sense legal rights, and legal rights of the highest importance and in the strictest sense of the words. Some of these rights are to be exercised out of Parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound not by resolutions of either House of Parliament, but by its own judgment as to the law of the land of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons, and it seems to me that from the nature of the case such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise in precisely the same relation as we the Judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which

apply them to particular cases—that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologise for the supposition) wilfully disregard it, they resemble mistaken or unjust Judges, but in either case there is, in my judgment, no appeal from their decision. The law of the land gives no such appeal: no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses.

This is enough to justify the conclusion at which I arrive. We ought not to try to make new laws under the pretence of declaring the existing law, but I must add that this is not a case in which I at least feel tempted to do so. It seems to me that if we were to attempt to erect ourselves into a Court of Appeal from them, we should consult neither the public interest, nor the interests of Parliament and the Constitution, nor our own dignity. We should provoke a conflict between the House of Commons and this Court, which in itself would be a great evil; and even upon the most improbable supposition of their acquiescence in our adverse decision, an appeal would lie from that decision to the Court of Appeal, and thence to the House of Lords, which would thus become the Judges in the last resort of the powers and privileges of the House of Commons.

For these reasons I am of opinion that there must be judgment for the defendant.

MATHEW, J., concurred.

Judgment for defendant.

Plaintiff in person; Solicitor to the Treasury, for defendant.

1883. Dec. 5. THE WEST LONDON COMMERCIAL BANK (LIMITED) *v.* KITSON, PORTER AND WOODWARD.

Company—Directors, Personal Liability of— Bill of Exchange — Principal and Agent—Warranty of Authority—Fraud.

The defendants, two directors and the secretary of an incorporated limited company which had no power to accept bills, at the request of their engineer, and in accordance with a resolution that the company should accept his draft on account of professional services, gave to the engineer an acceptance in the following terms: "Accepted payable at .... for and on behalf of the tramway company—G. K., S. F. P. (directors), B. W. (secretary)." When giving the acceptance the directors told the engineer that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills; and the engineer, on pressing them for the acceptance, told them that he could raise money on it from his father-in-law. The engineer indorsed the bill to the plaintiffs' bank for value, and without notice to them of the understanding between him and the defendants. The bill was dishonoured, and the defendants were sued by the holders:—Held, *that the defendants were personally liable, as by accepting a negotiable instrument payable to order, and putting it within the power of the drawer to negotiate it, they represented that they had authority to accept, and such representation was false in fact. As between themselves and a bona fide holder for value, they could not deny such authority, nor the implied contract that they had such authority, and such misrepresentation was one of fact, and would therefore support an action.* Held, *further, by* DAY, J., *that the defendants were guilty of constructive fraud by handing to the engineer a bill bearing an untrue representation that they were authorised to accept the bill on behalf of the company.*

This was a Case stated for the opinion of the Court in an action by the plaintiffs, as holders of a bill of exchange for 400*l.*, dated the 9th of November, 1881, accepted by the defendants; and, in the alternative,

to recover the same sum of 400*l.* as money lent by the plaintiffs to the defendants; and, in the further alternative, to recover damages for misrepresentation by the defendants that they had power to accept bills for and on behalf of the Brentford and Isleworth Tramways Company.

The following facts appeared on the statement of the Special Case:—

The Brentford and Isleworth Tramways Company was incorporated under 42 & 43 Vict. c. ccvii. and 43 & 44 Vict. c. cxcvi. for the purpose of constructing new tramways in Middlesex. In November, 1881, the defendants Kitson and Porter were two out of the five directors; the defendant Woodward was the secretary of the company; and one Ashdown was the engineer who had superintended the works of the company.

In November, 1881, the company was in pecuniary difficulties, being indebted to the contractor in 2,800*l.*, towards which the directors had given him bills to the amount of 2,500*l.*, and to various other persons in about 1,000*l.*; while Ashdown was pressing the defendants for payment of his claim for engineering services. The bills given to the contractor were drawn by him upon the company, accepted by the directors, and handed to the contractor for the purpose of his giving them to the solicitor to the company, who had agreed to advance money upon them.

On the 9th of November, 1881, after the aforesaid bills had been given to the contractor, Ashdown requested the defendants, as directors and secretary of the company, to accept a bill for 400*l.* on account of his claim for professional services, in order that he might raise money upon it, as he told the defendants that he would be able to do from his father-in-law. The defendants accepted the said bill accordingly; but they did not communicate with the said father-in-law, nor take any steps to restrain the negotiation of the said bill beyond telling Ashdown when they gave it to him that they did so on the understanding that he should not negotiate it and only as a recognition of the company's debt to him, as the company had no power to accept bills.

The bill, dated the 9th of November, 1881, drawn by Ashdown, directed to the Brentford and Isleworth Tramways Company, was for 400*l.*, payable three months after date. The acceptance was as follows: "Accepted payable at Messrs. Hull, Smith, Woodbridge & Co.'s bank, Brentford, for and on behalf of the Brentford and Isleworth Tramways Company—

"Geo. Kitson
"S. F. Porter } Directors.
"B. Woodward, Secretary."

Ashdown thereupon took the bill to the plaintiffs and asked them to discount the same, and he represented to the plaintiffs that it was a good trade bill and sure to be met at maturity. The plaintiffs, believing the said representations, on the faith thereof discounted the bill for Ashdown, who, with the defendants' knowledge and consent (they being, however, ignorant at the time of the mode in which he had obtained the money), used the money so obtained for the purpose of partly satisfying his own claims upon the company.

The said acceptance fell due; it was presented for payment, and was dishonoured. The plaintiffs thereupon commenced an action against the tramways company, which was defended by the express order of the defendants on the ground that it was beyond the power of the company to accept bills, and that the company was not liable on any such acceptance.

The defendants accepted the said bill in the manner aforesaid, well knowing that the company had no power to accept bills, and with the consciousness of the risk that there was, if Ashdown did not keep faith with them, of the bill being put into circulation, and so passing into the hands of a holder for value.

The question for the Court is whether the defendants, or either, and which of them, are or is liable to the plaintiffs upon the said bill, or liable to any, and what, amount to the plaintiffs in respect of either of the alternative causes of action.

Francis Turner, for the plaintiffs.—The defendants are liable as having accepted on behalf of the company, knowing that they had no power so to do. They are themselves the virtual acceptors. Or their acceptance is equivalent to a warranty that they had authority from the company to accept, and that the company had power to accept bills. The representation was

false in fact, and must be taken to be fraudulent, inasmuch as they took the risk of its being acted upon by some innocent party.

The Court then called on *Terrell*, for the defendants Kitson and Porter.—There is no personal liability here on the defendants. The acceptance is, in terms, on behalf of the company, and at most it amounts to a representation that, as a matter of law, the company can accept bills. Such a representation is no ground for an action. The plaintiffs must be taken to be affected with knowledge of the constitution of the tramways company, and even an express statement as to the legal power of a company will not, because it is untrue, render the person making it liable—*Beattie* v. *Lord Ebury* (1). The representation here is only an implied one, whereas in the case cited it was express.

Then, as Ashdown took the bill on the undertaking not to negotiate it, and as he had assured the defendants that it would not be put in circulation, the plaintiffs cannot stand in any better position than he (the drawer) does. If it is once admitted that they might let him have the bill as a recognition of his claim, for the purpose of its being deposited with his father-in-law, they were not bound to, and indeed could not, take any further steps afterwards to prevent its being circulated.

F. Turner, in reply.—This is not within the case cited, for there is a representation of fact here. A mere request to honour cheques was held not to constitute a warranty that there was power in the company to overdraw; but in the present case the defendants represent that they have the authority of the company to accept the bill on its behalf. Unless they could bind the company the bill was valueless, even if the company had legal power to accept bills.

DAY, J.—I am of opinion that the plaintiffs are entitled to judgment. The action is brought not strictly on the bill, because the defendants are not liable as acceptors on the bill, having accepted it for and on behalf of the tramways company; but it is sought to make them liable on a warranty or misrepresentation, or fraudulent representation that they had authority to accept the bill so as to bind the tramways company. I think that warranty is not applicable under the circumstances; but the question is rather whether there was a misrepresentation or a fraudulent representation. The difficulty as to fraud which I feel arises from the statements in the case, which appear rather contradictory. It is found that Ashdown was told that the defendants had no power to accept bills on behalf of the company, and so he took this bill with full knowledge of that fact; but inasmuch as to support a charge of fraud there must be proof of a false statement made by the defendants with the intention that it should be acted upon, I feel some difficulty in seeing what false statement there was which it was intended by the defendants should be acted upon by the indorsees. The latter, however, took the bill in ignorance of the true facts, though Ashdown knew them, and, as against the defendants, ought to be entitled to insist on the representation which the acceptance implied. In this respect, therefore, the statements in the case appear inconsistent, because, though the bill was given to Ashdown on the understanding that he should not negotiate it, the intention of the defendants clearly was that in some way he should raise money upon it. I cannot therefore say that there was legal fraud. It might, however, in my opinion, be inferred, from the knowledge of the directors of this being a worthless piece of paper, that there was an intention to defraud, and I might hold constructive fraud to be sufficiently shewn here as between the defendant directors and the plaintiffs as indorsees of that document.

I am not compelled, however, to rest my judgment on holding this to be a fraud as against indorsees; I can support it on the ground of the defendants having made a false representation on the face of a negotiable instrument. If a person makes a representation which he knows to be untrue on the face of a negotiable instrument, he is bound to make it good to the person who has acted upon it, and who has become, as have the plaintiffs here, indorsee for value without notice.

It is said, indeed, that there was no false representation of fact, and that a represent-

(1) 41 Law J. Rep. Chanc. 804; 44 Law J. Rep. Chanc. (H.L.) 20.

ation of a matter of law is not actionable, The latter proposition is correct where the representation is a pure matter of law; but a representation that this was a valid acceptance does not fall within the rule. This was a representation that the defendants were authorised to accept the bill on behalf of the company, and that the company were empowered to accept bills. The questions, therefore, arising—namely, whether this was the acceptance of the company, or of these men as directors of the company—were questions of mixed law and fact.

The case cited of *Beattie* v. *Lord Ebury* (1) is consequently no authority here against the plaintiffs, as it nowhere suggests that an action will not lie in respect of a representation of a matter of fact, but, on the contrary, lays down that an action will lie for a statement false in fact and erroneous in law against the person making it.

There is, in my opinion, no doubt that in the case before us we have a representation of fact false to the knowledge of the persons making it in reference to the power of the company to accept bills, and in reference to their own authority to bind the company by an acceptance. Such representation may not have been fraudulent, because it was not intended that the bill should be negotiated; but there is sufficient to shew an intention that the representation should be acted upon to a certain extent; and as the plaintiffs have acted upon it, the defendants are, in my opinion, liable to them.

SMITH, J.—I have had considerable difficulty in this case, and my mind is not free from doubt, but I have come to the conclusion that the plaintiffs are entitled to judgment, though I do not put it wholly on the same ground as my brother Day. The first point to be considered is, what representation, if any, was made by the three directors. It seems to me that when they say we accept this bill "for and on behalf of the tramways company," they do represent that they have authority to accept: they make a representation of an existing fact, which fact was in this case untrue. It is contended that, as the company had no power in law to accept bills, there was nothing beyond a representation of law; but I cannot agree, as I think they misrepresented the fact of their own authority. Holding this view very strongly on the case before me, I think it is distinguishable from *Beattie* v. *Lord Ebury* (1), for the document there was simply, "Please honour the cheques of this company signed by two of the directors and counter-signed by the secretary." All that Lord Justice Mellish decided was that that did not amount to any representation of fact. The representation was simply as to the power of the company to overdraw, and that was a matter of law. Here, however, I am of opinion that the defendants made a misrepresentation of fact. The next question, then, is, can the plaintiffs take advantage of such representation? I think that they can, and in this way: The defendants have accepted a negotiable instrument payable to order, and have put it into the hands of the drawer and within his power to negotiate it; they have given it to him that he might raise money upon it, and with the consciousness of the risk there was of its being negotiated. It seems to me that, having done this, it is competent for a *bona fide* holder for value who has taken the bill on the faith of these representations to recover against the defendants in an action alleging a contract by them that they had authority to accept the bill. This is an exception to the rule that no person may sue on a contract not made with himself: as happens also in cases of published time tables of railway companies and of advertisements of rewards, where any person not a party to the publication or offer may nevertheless sue in respect of his acting thereupon. So, as the defendants here put it into the power of Ashdown to do what he did, I think that the plaintiffs are entitled to maintain the action.

Judgment for the plaintiffs.

Solicitors—Shaw & Co., for plaintiffs; G. F. Jones, for defendants.

1884. March 3. BURLINSON *v.* HALL.

Debtor and Creditor—Chose in Action—Assignment of Debt—"Absolute Assignment"—Mortgagor and Mortgagee—Judicature Act, 1873, *s.* 25, *sub-s.* 6.

By a deed of February, 1883, *after reciting that T. was indebted to the plaintiff in the sum of* 152*l.*, *T. assigned to the plaintiff the debts in the schedule mentioned, upon trust that the plaintiff should receive the same, and, after retaining to himself the sum of* 152*l.*, *should pay the surplus to T. Then followed a covenant by T. to pay the plaintiff the* 152*l. in the August following, and, if the sum was not paid by that date, to pay interest thereon half-yearly until payment in full. In the schedule four debts owing to T., and amounting together to* 244*l.*, *were set out. In respect of one of them, owed by the defendant, the plaintiff now sued the defendant*:—Held, *that the deed was an "absolute assignment" (not purporting to be by way of charge only) within section* 25, *sub-s.* 6, *of the Judicature Act*, 1873, *and the plaintiff was therefore entitled to maintain the action.*

The National Provincial Bank *v.* Harle (50 Law J. Rep. Q.B. 437; Law Rep. 6 Q.B. D. 627) *distinguished.*

By the statement of claim the plaintiff sued for moneys due to him in his own right, and also for 109*l.* which he claimed as assignee of a debt due from the defendant to one Tucker for work done and moneys expended by Tucker for the defendant. In the particulars the debt was described as having been assigned to the plaintiff by an indenture dated the 27th of February, 1883, notice whereof had been duly given to the defendant before action.

By the statement of defence the defendant pleaded various answers to the statement of claim, and as regards the sum claimed by the plaintiff as assignee of Tucker the defendant craved leave to refer to the alleged indenture, and denied that the plaintiff had any right or title to sue for or recover such sum. Reply, joining issue.

By order of the Master in chambers the question of sufficiency of the title of the plaintiff to sue for the said debt of 109*l.* was set down for argument under Order XXXIV. rule 2, to be disposed of before proceeding to the trial of the cause.

The indenture of the 27th of February, 1883, was made between Tucker and the plaintiff, and was indorsed "Tucker to Burlinson. Mortgage of Debts." After reciting that the several persons whose names were set out in the schedule were indebted to Tucker in the several sums set opposite to their names (1), and that Tucker was indebted to the plaintiff in the sum of 152*l.*, the deed witnessed that Tucker assigned and transferred to the plaintiff the debts in the schedule mentioned, and all the right and interest, claim and demand of Tucker to and in the same debts; to have, receive and take the same debts, upon trust that the plaintiff should receive the same, and, after paying and retaining to himself the said sum of 152*l.*, with expenses and interest, should pay the surplus (if any) to Tucker. Then followed a covenant by Tucker to pay to the plaintiff the said sum of 152*l.* on the 27th of August following, and that, if payment was not made by that date, he would pay interest half-yearly until payment. Tucker also appointed the plaintiff his attorney to receive and recover the debts thereby assigned. There were also covenants for further assurance.

Gainsford Bruce, Q.C. (*Harmsworth* with him), for the plaintiff.—The deed constitutes an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873 (2). *The National Provincial*

(1) The schedule contained the names of four persons, of whom the defendant was one, whose debts amounted in the aggregate to 244*l.*

(2) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6: "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right

Bank v. *Harle* (3) is distinguishable on the ground on which Pollock, B., bases his judgment—namely, that the plaintiffs in that case undertook to reconvey the mortgaged premises to the defendants. The plaintiff therefore, as assignee of a *chose in action*, is entitled to maintain this action against the defendant.

Petheram, Q.C. (*McClymont* with him).—An assignment to be within the section must be equivalent to an absolute sale; and, at most, this is a mortgage of these debts, containing the ordinary incident of a mortgage, to the effect that after the mortgagee's claim is satisfied the surplus belongs to the assignor. This deed is therefore in the nature of a charge which is expressly excepted from section 25, sub-section 6 (2). The circumstance of a proviso for reconveyance is immaterial—see *Coote on Mortgages*, p. 29; consequently, the principle of *The National Provincial Bank* v. *Harle* (3) remains untouched, and is in favour of the present contention.

Gainsford Bruce, in reply, referred to *Fisher on Mortgages*, 4th ed. p. 3.

DAY, J.—This action is brought by the plaintiff to recover certain sums of money claimed by him under two separate titles: in the one case he claims in his own right, in the other as assignee of Tucker. Prior to the Judicature Act, 1873, two actions would at common law have had to have been brought by the plaintiff—one in his own name and the other in the name of Tucker; in equity he would have had to make Tucker a party, suing with him or against him (4). It was intended by the Judicature Act to simplify the procedure and to lessen the cost; it was intended, not to limit the rights of the parties, but to extend them, and to enable the party in such a case to sue in his own name simply. It has been argued that this deed is not an absolute assignment of the debts, but purports to be only a charge on them; but I am of opinion that it is an absolute assignment for the purpose of securing payment of the debt owed by Tucker to the plaintiff. I do not understand an absolute assignment necessarily to be, as has been contended, equivalent to a sale, but to be something which is distinguished from a contingent assignment. This deed vests the title to the debt in the assignee: if the debt which it is to secure is paid off, no doubt the assignor would have a right to a reconveyance, but until then the title of the assignee is absolute and indefeasible. It has been contended that this conveyance is "by way of charge only"; but I differ from that contention; for I think a charge is different to an assignment: a charge is a mere appropriation of a particular fund to a particular debt; but this deed purports to be, and is, an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873.

The only difficulty that arises is from the case of *The National Provincial Bank* v. *Harle* (3), but that case is distinguishable on the ground pointed out by the counsel for the plaintiff. I come, therefore, to the conclusion that the action is maintainable.

SMITH, J.—I am of the same opinion. At first I had considerable doubt as to whether the plaintiff was entitled to maintain the action, because of the case of *The National Provincial Bank* v. *Harle* (3); and although in the last paragraph Mr. Baron Pollock puts as a reason for his judgment that there was a proviso for reconveyance, yet I do not wish to distinguish the case on that ground. I have come to the conclusion, however, that that case is distinguishable, and that the plaintiff is entitled to maintain the present action.

Before the Judicature Act the plaintiff would have had to sue in Tucker's name

to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

(3) 50 Law J. Rep. Q.B. 437; Law Rep. 6 Q.B. D. 627.

(4) See *Hammond* v. *Messenger*, 9 Sim. 327; 7 Law J. Rep. Chanc. 310.

Burlinson v. *Hall.*

at common law, or to join Tucker if he sued in equity; but now he can sue in his own name; and if there is any dispute as to the assignment, or if there are conflicting claims to the debt, by the proviso at the end of the section, Hall can call on the parties claiming to interplead: so that he is in no worse position than under the old procedure. Nor is Tucker in a worse position: for he is manifestly bound by the deed, whether he is a party to the action or not. It has been contended that this conveyance by Tucker to the plaintiff is not an absolute assignment, because there is a resulting trust: so that the plaintiff is a trustee of this amount; but that does not make it any the less an absolute assignment, and it is, consequently, within section 25, sub-section 6. It was also contended that the conveyance was "by way of charge only," but I do not agree with Mr. Justice Day as to the effect of a charge. In our judgment, therefore, the action is maintainable.

Judgment for the plaintiff; costs in the cause.

Solicitors—Miller & Miller, for plaintiff; R. Davies, agent for Suaton Hall, Sunderland, for defendant.

[IN THE COURT OF APPEAL.]

1884. Feb. 18. } ILLINGWORTH *v.* THE BULMER EAST HIGHWAY BOARD.

Practice—Appeal—Special Case stated by Quarter Sessions—Removal into Queen's Bench Division by certiorari—Highway Act, 1835 (5 & 6 *Will.* 4. *c.* 50), *ss.* 107 *and* 108—*Judicature Act*, 1873, *ss.* 19 *and* 45.

[For the report of the above case, see 53 Law J. Rep. M.C. 60.]

1884. March 14. } THE BURIAL BOARD OF THE PARISH OF PADDINGTON (*appellants*) *v.* THE COMMISSIONERS OF INLAND REVENUE (*respondents*).

Revenue—Income Tax—Annual Profits—Surplus Income of Burial Board—Charitable Purpose—Business carried on by Ratepayers—5 & 6 *Vict. c.* 35 (*Property Tax Act*, 1842), *s.* 60.

A burial board formed under Act of Parliament, and empowered to charge fees in accordance with a scale approved by a Secretary of State, were directed, after satisfying all the liabilities of the board with reference to the execution of the Act in or for the parish, and providing such a balance as should be deemed by the board sufficient to meet their probable liabilities during the then next year, to pay over, at the time of the annual meeting, any surplus money there might be to the overseers, in aid of the poor rate of the parish:—Held, *that such surplus was assessable to the income tax, being, in effect, a profit made in a business carried on by the ratepayers for the benefit of themselves, and fell within section* 60 *of the Property Tax Act*, 1842 (5 & 6 *Vict. c.* 35).

Special Case stated on appeal against a decision of the Income Tax Commissioners confirming an assessment upon the Burial Board of Paddington in respect of alleged annual profits.

The board was formed in 1853, under 15 & 16 Vict. c. 85, and the sum required —16,600*l.*—was borrowed and secured upon the poor rates of Paddington parish, under sections 20 and 21, to be repaid by instalments. The whole of this loan was finally paid off in 1870.

The money received by the burial board, and which constitutes the sole source of income of the board, is derived from payments made in accordance with a fixed scale of charges, under section 34 of the said Act, for interments in the burial ground provided for the parish, and for other matters shewn in a printed list attached to the Case.

The 22nd section of the said Act 15 & 16 Vict. c. 85, provides as follows:—"The money raised for defraying such expenses,

and the income arising from the burial ground provided for the parish, except fees payable to the incumbent, clerk and sexton of the parish, and the other fees herein directed to be otherwise paid, shall be applied by the board in or towards defraying the expenses of the said board under this Act; and whenever, after repayment of all moneys borrowed for the purposes of this Act in or for any parish, and the interest thereof, and after satisfying all the liabilities of the board with reference to the execution of this Act in or for the parish, and providing such a balance as shall be deemed by the board sufficient to meet their probable liabilities during the then next year, there shall be at the time of holding the meeting of the vestry at which the yearly report of the auditors shall be produced any surplus money at the disposal of the board, they shall pay the same to the overseers, in aid of the rate for the relief of the poor of the parish."

Since 1870 all surplus money has in each year been paid to the overseers of Paddington, in accordance with section 22, and has been applied by them in aid of the poor rate of the said parish.

The average annual amount of surplus money at the disposal of the said board for the three years ending the 31st of March, 1879, was 2,544*l.* The board were assessed for income tax for the year commencing the 6th of April, 1879, upon the said sum of 2,544*l.*, and appealed from such assessment to the Income Tax Commissioners.

The commissioners confirmed the assessment, subject to the opinion of the Court on the Case stated.

A. Charles, Q.C. (*Northmore Lawrence* and *Peile* with him), for the appellants.—The burial board are not to be assessed in respect of this surplus of income over expenditure. It does not fall within section 60 of the Property Tax Act, 1842, schedule A. They are, at any rate, merely trustees for charitable purposes; the funds are vested in the board in aid of the poor rate. The original outlay was charged upon the poor rate; and there is no case of making profits here—no beneficial occupation of the land. It is necessary to have a surplus to guard against contingencies, and because it is impossible to regulate the fees so as to make income and expenditure exactly tally. So the board are not a trading corporation within either schedule A or schedule B, being merely the conduit-pipe by which money originally contributed by the ratepayers is paid back to the general fund. We rely on the case of *The Glasgow Corporation Water Commissioners* v. *The Solicitor of Inland Revenue* (1). There, as here, it was necessary to levy money from the ratepayers in anticipation of the expenses being incurred; the surplus returned to the ratepayers' fund was held not to be assessable. The case is approved in the Court of Appeal in *The Mersey Docks and Harbour Board* v. *Lucas* (2).

The Attorney-General and *A. V. Dicey, contra*, were not called on.

DAY, J.—I am clearly of opinion that this appeal of the burial board fails, and that this surplus money in their hands is liable to income tax. It seems unnecessary to consider where the original fund came from which was raised for establishing this burial board; that fund has long since been paid off, and the board have been self-supporting, without needing rate or contribution from the ratepayers.

The result of their carrying on business in the way in which they do, is that there is a surplus at the end of each year after paying all expenses. Of this surplus the board are constituted trustees for the parish of Paddington; they are not allowed to appropriate it, but must apply it for the benefit of the parish by paying it over towards the reduction of the rates. This, therefore, is a business carried on for the benefit of the ratepayers of Paddington, and, as such, the profits are assessable.

But it is said that the case is controlled—or, rather, that we ought to be influenced—by the decision given by the Scotch Courts in reference to the Glasgow waterworks, managed by the corporation for the benefit of the ratepayers. Now I have read that judgment with interest and with approval. What were the facts? The inhabitants of Glasgow were not carrying on a business with reference to the water supply of the city; but they were, through the corporation, arranging to supply themselves with

(1) Court of Sess. Cas. 4th series, vol. ii. p. 708.
(2) 51 Law J. Rep. Q.B. 114.

water at the least possible expense. It was necessary to estimate the expenses of providing the water in advance, and to provide for this by levying a rate; but when, on making up the accounts, it should be found that the sum so levied exceeded the actual expenditure in any year, then what was over was carried over to the next year's fund. This was simply a convenient way for having a fund in hand. No profits, in any sense of the word, were made. The ratepayers by this arrangement provided water for themselves, and paid therefor neither more nor less than the water cost.

The present is quite a different scheme. These fees are levied by the burial board as they like, subject only to the sanction of the Home Secretary for their scale. They may make, and do make, profits, and those profits they apply in reduction of the burden on the general body of ratepayers. We need not, however, trouble ourselves about the destination of the profits; it is enough that profits are made.

Then it is said that this is a charitable purpose; but I do not see that it is so more than any other business. It is a business carried on by the ratepayers for the benefit of themselves; and, that being so, they must not carry it on without contributing to the public burdens.

SMITH, J.—I am of the same opinion. The question is whether this burial board carry on their operations at a profit, and whether such profit is assessable. It is conceded that the original expenses were, in the first place, to come out of the poor rate, as they were entitled to borrow money on the security of the rates. Then by section 34 they were empowered to charge fees, and out of the income so obtained they have paid back the whole of their borrowed money. They continue to carry on the same business and charge fees, and the result is that there is an excess of income over expenditure. Is that a gain or profit within the Income Tax Acts? It seems to me clearly that it is. We were pressed in argument by the *Glasgow Case* (1); but it is clearly distinguishable, in my opinion. The money there was raised on an estimate, and the difference between the estimate and the actual expenses was to be returned to the ratepayers. That was held to be not assessable; it was in no sense a profit. But this board may charge any fees which the Secretary of State will approve, and by means of such charges they make an income and a profit. Since the decision of *The Mersey Docks* v. *Lucas* (2) it is immaterial what is the destination of those profits. In point of fact, the ratepayers generally benefit to the extent of them. I think the Crown is entitled to judgment.

Appeal dismissed.

Solicitors—J. H. Hortin, for appellants; the Solicitor for Inland Revenue, for the Crown.

[IN THE COURT OF APPEAL.]

1884. Jan. 21, 22. } SWINBURNE *v.* MILBURN AND OTHERS.*

Lessor and Lessee—Covenant—Perpetual Renewal—Presumption of Law.

A lessor demised to a lessee certain hereditaments for the natural lives of three persons. The lease contained a covenant that the lessor, his heirs and assigns, upon the lessee "surrendering this present demise as hereinafter mentioned," would, at any time thereafter, at the request of the lessee, his heirs or assigns, as often as one or two life or lives of and in the hereditaments granted "shall drop and be determined, renew, fill up and grant a further term of and in the said premises for any other life or two lives of any other person or persons to be nominated by" the lessee, his heirs or assigns, in the place of the life or lives so determining, the lessee, his heirs or assigns, paying to the lessor for every such renewal for every life the sum of 40*s.*, "*and at the same time surrendering or delivering up this present demise to be cancelled*":— Held, *that this was a covenant for a perpetual renewal.*

Appeal by the defendants from the judgment of the Queen's Bench Division on the following Special Case:—

1. By an indenture of lease bearing date the 24th of March, 1827, for the con-

* *Coram* Brett, M.R., and Bowen, L.J.

siderations therein mentioned, Sir John Edward Swinburne, Baronet (since deceased), granted and demised to William Goodfellow, his heirs and assigns, one-fifth part of an acre of ground, together with the messuage and other buildings then or thereafter to be erected and built thereon: Together also with all and singular the appurtenances of the said messuage and premises belonging at Stamfordham, otherwise Stannerton, in the county of Northumberland, then in the possession of Hector Goodfellow, and more particularly and fully described in the said indenture of lease, for and during the natural lives of William Goodfellow, William Robson Scott, and Joseph Jordan, and for and during the natural life of each and every of them longest living, at and for the yearly rent of four shillings, payable as therein mentioned.

2. In the said indenture was contained a covenant on the part of the said lessor, which was in the words following:—"And also that the said Sir John Edward Swinburne, his heirs and assigns (upon the said William Goodfellow, his heirs or assigns, surrendering this present demise as hereinafter mentioned), shall and will at any time hereafter, at the request, costs and charges of the said William Goodfellow, his heirs or assigns, within the space of three calendar months after such request, as often as one or two life or lives of and in the said tenements, hereditaments and premises, with the appurtenances, shall drop and be determined, renew, fill up and grant a further term of and in the said premises for any other life or two lives of any other person or persons to be nominated by him the said William Goodfellow, his heirs or assigns, in the stead, place and room of the persons, life or lives so dropping or determining: he, the said William Goodfellow, his heirs or assigns, paying unto the said Sir John Edward Swinburne, his heirs or assigns, for every such renewal, filling up or granting such further term for every life or lives of such person or persons so to be renewed as aforesaid, the sum of forty shillings only, and at the same time surrendering or delivering up this present demise to be cancelled."

3. Either party is to be at liberty to refer to the said indenture of lease as part of this case.

4. The questions for the opinion of the Court are—first, whether the lessee's right of renewal was limited to two new lives in place of two of those named in the lease, or extended to and included renewals whenever and so often as any life or two lives of and in the premises should drop and be determined—or, in other words, is the covenant to be construed as one for perpetual renewal? Secondly, whether upon a renewal the lessee would be entitled to have inserted in a new lease a covenant for renewal similar to the covenant above set forth.

The Queen's Bench Division gave judgment, holding that the covenant was not a covenant for perpetual renewal.

The defendants appealed.

Barber, Q.C., and *Pollard*, for the appellants, contended that the language of the covenant, when construed according to the natural meaning of the words, shewed an intention to covenant for a perpetual renewal.

Brown v. *Tighe* (1), *Furnival* v. *Crew* (2), *Bridges* v. *Hitchcock* (3), *Sheppard* v. *Doolan* (4), *The Copper Mining Company* v. *Beach* (5), *Hare* v. *Burges* (6), *Ex parte Clarke* (7) and *Platt on Leases* (8) were cited.

Davey, Q.C., and *R. S. Wright*, for the plaintiff, contended that the covenant was only a covenant for one renewal.

Moore v. *Foley* (9), *Baynham* v. *Guy's Hospital* (10) and *Tritton* v. *Foote* (11) were cited.

BRETT, M.R.—We must first consider what is the rule of interpretation to be applied to this case. It has been urged that it must be a more strict rule than that which would be applied to the interpretation of any other kind of document. But why should a contract such as this be subjected

(1) 2 Cl. & F. 396; 8 Bligh N.S. 272.
(2) 3 Atk. 82.
(3) 5 Bro. P.C. 6
(4) 3 Drew & Warr. 1.
(5) 13 Beav. 478.
(6) 4 Kay & J. 45.
(7) 6 Ir. Rep. Eq. 51.
(8) Ed. 1847, vol. i. p. 706.
(9) 6 Ves. 232.
(10) 3 Ves. 294.
(11) 2 Bro. C.C. 635.

to a rule of construction different from that applied to any other contract? The governing rule to be applied in construing a contract is to see what is the intention of the parties from the manner in which they have expressed themselves. I should say that in the case of such a contract as this that is equally the governing rule. It is said that the rule has been laid down differently by different Judges, and more particularly by Lord Brougham in *Brown* v. *Tighe* (1), where he says (at p. 416) "a covenant for perpetual renewal must be clear, plain and distinct, and in terms that will not bear any other construction." The emphasis was put in argument on the words "any other construction"; and it is said that the rule is that the covenant must be so plain and distinct that it is not possible to construe it in any other way. To carry this proposition to the full extent, it must be said that, however clear, plain and distinct one part of a contract is to shew that it was the undoubted intention of the parties to covenant for a perpetual renewal, yet, because another part may bear some other construction, the Court must rule against that which was manifestly the intention of the parties. I cannot believe that there is any such rule. I believe that the phraseology of Lord Brougham was used in order to make more clear and distinct that which he himself had already made clear and distinct. If a contract is plain and distinct, then, to my mind, according to the ordinary rules of construction, it will only bear that construction which is plain and distinct. In my view, considering these cases as contracts between parties, the real rule is that laid down by Sullivan, M.R., in *Ex parte Clarke* (7), where he says (at p. 56): "Now, in approaching the consideration of this instrument, it is essential to bear in mind the rules which have been laid down for the construction of written instruments under which the Court is to construe the language of the instrument, and not to alter or expunge any portion of it, if, according to plain grammatical construction, the words as they stand are reasonably capable of a definite meaning. Presumption or speculation must not be permitted to have the slightest influence, if the meaning of the parties is reasonably plain on the language they have used, and as they have used it. I think that there cannot be any greater difficulty at getting at an agreement for the perpetual renewal of a lease, if the language used in the instrument plainly leads to it, than in getting at any other agreement which two men may enter into; and the authorities hereafter referred to clearly shew that the rules of construction are applied as coercively and uniformly to cases of contested rights of renewal in perpetuity as to any other subject-matter." I agree with that, noticing especially that presumption or speculation must not have any influence if the meaning of the parties is reasonably plain. If the meaning is not plain, then no doubt presumption must come in, and that presumption is that if the language, after plain construction, remains doubtful, the presumption is against perpetuity. That is the sole force of the presumption in this case. I am unable to agree with the judgment of the Divisional Court, and the appeal must therefore be allowed. A similar covenant to this, which we hold to be a covenant for perpetual renewal, must therefore be inserted in each new lease.

BOWEN, L.J.—The question is whether the covenant in this lease is one for perpetual renewal or not. It was pointed out long ago that these covenants for renewal ought to be treated in precisely the same way in law and in equity. In such cases the duty of the Court is to find out, from the language which the parties have employed, what is the true bargain between them. The parties had a perfect right to make any arrangement as to renewal, provided they made their meaning intelligible; and the only question is as to what they have done. In order to enable us to find out what was the real bargain, the law has given us a canon of interpretation—namely, that the burden of proof is upon the lessee who wishes to make out that there is a right of perpetual renewal, because the Courts lean against such an interpretation. What is the use of such a presumption? It is to assist in the construction of the document, and not, after that has been arrived at, to lead the Court away from the meaning of the words used. There can be no arbitrary rule that a bargain for

perpetual renewal, if made, is to be disregarded unless it is expressed with the orthodox minimum of precision. Judges have sometimes, after laying down canons of construction properly so called, set forth in language of minute criticism additional explanations, which, useful as they are for guidance, are not rules of law or so to be regarded. To extract out of them something which lays an additional burden on a party in making out a case is to misuse them. That, I think, is what Sullivan, M.R., meant to indicate in the judgment referred to by the Master of the Rolls. I can understand a rule to the effect that a person who is setting up a covenant for perpetual renewal must make his case clear, but I cannot understand a further rule of precision that he is to make it very clear. That is merely adding an epithet. Once satisfy yourself according to the canons of interpretation what is the meaning of a document which is not required by law to be in any special form or legal verbiage, and the thing is done. As soon as the bargain is ascertained, neither law nor equity says that the parties are to be punished for not having expressed themselves more fitly: in other words, rules are useful in helping us to understand contracts, and not to justify us in misunderstanding them. What was said by Sir E. Sugden in *Sheppard* v. *Doolan* (4) is borne out by Vice-Chancellor Wood in *Hare* v. *Burgess* (6), and is not inconsistent with what I have said.

Appeal allowed.

Solicitors—Longbourne, Longbourne & Stevens, for plaintiff; J., E. & H. Scott, agents for Bush & Wilson, Newcastle-on-Tyne, for defendants.

[IN THE COURT OF APPEAL.]

1884. Jan. 25. THE QUEEN (*on the prosecution of Nathan*) *v.* THE COMMISSIONERS OF INLAND REVENUE.*

Mandamus — Revenue — Commissioners of Inland Revenue—Return of Probate Duty—5 & 6 Vict. c. 79. s. 23—Petition of Right.

The rule governing the discretion of the Court as to granting a mandamus is, that where there is no specific remedy, a mandamus will be granted, that justice may be done. A petition of right is such a remedy, though it depends upon the fiat of the Attorney-General being given.

The prosecutor applied for a mandamus to the defendants to return excess of probate duty, under 5 & 6 Vict. c. 79. s. 23. Probate duty is paid to the defendants to and for the use of the Crown, and when received it is handed over by them to the Crown. The defendants had declined to return the duty paid, on the ground that they were not satisfied of the lawfulness of the claim:— Held, *that, assuming the claimant to be entitled to some remedy, still a mandamus ought not to issue, for that there was a specific remedy by petition of right, inasmuch as the money was in the hands of the Crown.*

The King *v.* The Lords of the Treasury (5 Law J. Rep. K.B. 20) *dissented from.*

Appeal of the defendants from the judgment of the Queen's Bench Division granting a rule for a *mandamus* directing them to return excess of probate duty.

By a marriage settlement made at Hamburg, one Nathan, who was domiciled there, covenanted that 55,000*l.* should be paid to his wife at his death. The settlor died at Hamburg, and the prosecutor, his executor, paid to the defendants probate duty on 118,000*l.*, the amount of the assets in England. The prosecutor subsequently sought by *mandamus* to recover 1,650*l.*, paid as probate duty on a sum of 55,000*l.* alleged to have been paid to the wife under the settlement, on the ground that such sum was a debt which had been discharged out of the English assets, and that he was therefore entitled to a return of probate

* *Coram* Brett, M.R., and Bowen, L.J.

The Queen v. *Commissioners of Inland Revenue, App.*

duty in respect thereof, under 5 & 6 Vict. c. 79. s. 23 (1).

The claim was disputed by the defendants, who contended that the wife took by succession and not by virtue of any contract which created a debt, and that, if there was a debt, the 55,000*l.* should have been paid out of the assets existing in the place where the contract was made. An objection was also taken that a *mandamus* would not lie in such a case.

By 55 Geo. 3. c. 184. s. 2, the duties to be levied under the Act are to be paid "unto and for the use of His Majesty, his heirs and successors." In accordance with regulations made under 29 Vict. c. 39. s. 10, all moneys received by the Commissioners of Inland Revenue are paid over every night to the account of Her Majesty's Exchequer.

The Queen's Bench Division granted a rule for a *mandamus*.

The defendants appealed.

The Attorney-General (*Sir H. James, Q.C.*), and *Dicey*, for the appellants.—There are two points—whether a *mandamus* is a proper remedy; and, if so, whether the Court in their discretion will allow it. The commissioners are servants of the Crown, and it is laid down by Coleridge, J., in *In re The Baron de Bode* (2), that "against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a *mandamus* will not lie." In *The King* v. *The Lords of the Treasury* (3) a *mandamus* did issue in such circumstances; but Lord Denman, C.J., puts it on the ground that the commissioners had, under a statute, received the money to hold for the applicant. That case was doubted in *The Queen* v. *The Lords of the Treasury* (4). In the present case the commissioners received the money as servants of the Crown, and by 29 Vict. c. 29. s. 10, they had to pay it to the Crown. If the commissioners are satisfied as to the claim, they are required by 5 & 6 Vict. c. 79. s. 23 (1), to repay the money, and there is then a duty on the Crown to pay it over. But here the commissioners are not satisfied. It being Crown money, the remedy is to ask the Crown by petition of right to pay the money. In *The King* v. *The Bishop of Chester* (5), Buller, J., referring to Lord Mansfield, says, "He has always said, this Court will not interpose by granting a *mandamus*, unless the party making the application has no other specific legal remedy." The Court below said that a petition of right is not such a remedy, because the fiat may be withheld. But that is on the assumption that wrong will be done. In *Percival* v. *The Queen* (6) there was a petition of right on this very statute. It is a legal remedy in the sense that it is issued in due course of law—*Allen on The Royal Prerogative*, p. 94 (ed. 1849), and *Thomas* v. *The Queen* (7). Therefore, assuming that a *mandamus* would otherwise lie, it will not lie here, because a petition of right affords another remedy.

As to the question of discretion, the inconvenience of proceeding by *mandamus* is great, for the Crown will have to make a return; but it is not in possession of the facts, and cannot get information, as the assets are abroad. But, on a petition of right, discovery can be obtained by the Crown under Bovill's Act (23 & 24 Vict. c. 34). A petition of right is not only the most convenient remedy, but that by which justice can best be done. In such

(1) 5 & 6 Vict. c. 79. s. 23: ". . . . Where it shall be proved by oath and proper vouchers, to the satisfaction of the said Commissioners of Stamps and Taxes, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as, being deducted from the amount or value of the estate and effects of the deceased for or in respect of which a probate or letters of administration shall have been granted in England, . . . shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate or effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration . . . . than shall have been actually paid thereon, it shall be lawful for the said Commissioners of Stamps and Taxes and they are hereby required to return the difference. . . ."

(2) 6 Dowl. P.C. at p. 792; 8 Q.B. Rep. 208.

(3) 4 Ad. & E. 286; 5 Law J. Rep. K.B. 20.

(4) 41 Law J. Rep. Q.B. 178; Law Rep. 7 Q.B. 387.

(5) 1 Term Rep. 396, at p. 404.

(6) 3 Hurl. & C. 217; 33 Law J. Rep. Exch 289.

(7) 44 Law J. Rep. Q.B. 9; Law Rep. 10 Q.B. 31.

a case as this the fiat would certainly be granted. As to the satisfaction of the commissioners under 5 & 6 Vict. c. 79. s. 23 (1), it has never been decided as to what is the remedy where they have *bona fide* come to a conclusion that they are not satisfied, but the Court think they should be.

Cookson, Q.C., and *W. H. Clay*, for the respondent.—As to the jurisdiction, there are three cases in which a *mandamus* has been granted for return of probate duty under the statute in question—namely, in *The Queen* v. *The Commissioners of Stamps and Taxes; Ostell's Case* (8), *The Queen* v. *The Commissioners of Stamps and Taxes; Stracey's Case* (9) and in *The Queen* v. *The Commissioners of Stamps and Taxes; Wallace's Case* (10). Section 23 (1) of 5 & 6 Vict. c. 79, imposes a statutory duty upon the commissioners towards the claimant, and in *The King* v. *The Lords of the Treasury* (3) it is enunciated that in such a case a *mandamus* will lie. In *In re Smyth* (11) the claimant did not succeed because there was no such duty. [*The Queen* v. *The Commissioners of Woods and Forests* (12), *per* Lord Denman, C.J., referring to *In re Hand* (13), *The Queen* v. *The Lords of the Treasury: the Queen Dowager's Case* (14) and *The Queen* v. *The Lords of the Treasury* (4), were also cited.] The claimant is asking for his own money, which the statute assumes to be under the control of the commissioners. A petition of right is not the proper remedy. In *The King* v. *The Bank of England* (15), Lord Mansfield says, "When there is no specific remedy, the Court will grant a *mandamus* that justice may be done. But where (as in this case) an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the Court will not interpose the extraordinary remedy of a *mandamus*." Therefore there must be a legal right of action to preclude a *mandamus*, and so Buller, J., in *The King* v. *The Bishop of Chester* (5), specifies an assize. See also *The Queen* v. *The Archbishop of Canterbury* (16) and *Tapping on Mandamus*, p. 9. But a petition of right is not a legal but a constitutional remedy, dependent upon the fiat of the Attorney-General being obtained.

As to the discretion of the commissioners under section 23—to say that they are to be the sole judges is to put an unreasonable construction on the statute, as shewn in *Braunstein* v. *The Accidental Death Insurance Company* (17). Whether they had reasonable proof of the claim will be an issue in this case.

Dicey, in reply.—In *Ostell's Case* (8) there is no proof that the question of the *mandamus* was raised or even mentioned. In *Wallace's Case* (10) the commissioners did not insist on the objection, and Lord Denman, C.J., said that the case was not to be a precedent on that point. In *Stracey's Case* (9) the point was not discussed. In *The Queen Dowager's Case* (14) the case was different, for the commissioners were not mere servants of the Crown. On the other hand, in each of the cases of *Percival* v. *The Queen* (6), *The Executors of Perry* v. *The Queen* (18) and *De Lancey* v. *The Queen* (19) there was a petition of right for return of probate duty.

BRETT, M.R.—In this case a sum of money was paid by the claimant to the Commissioners of Inland Revenue in respect of an alleged succession to property. It is admitted that, by the Act of Parliament which imposes the duty, the money was properly paid in the first instance; but it is alleged that on certain principles the claimant is entitled to have a portion of the money repaid. The commissioners declined to repay it, on the ground that they were not satisfied that the claim was lawful under the statute. On the application of the claimant, the Divisional Court granted a *mandamus* to the commissioners to re-

(8) 18 Law J. Rep. Q.B. 201.
(9) 6 Q.B. Rep. 657.
(10) 9 Q.B. Rep. 637; 16 Law J. Rep. Q.B. 75.
(11) 4 Ad. & E. 976.
(12) 15 Q.B. Rep. at p. 761; 19 Law J. Rep. Q.B. 497.
(13) 4 Ad. & E. 984.
(14) 16 Q.B. Rep. 357; 20 Law J. Rep. Q.B. 305.
(15) 2 Dougl. 524, at p. 526.
(16) 11 Q.B. Rep. 483; 17 Law J. Rep. Q.B. 252.
(17) 1 B. & S. 782; 31 Law J. Rep. Q.B. 17.
(18) 38 Law J. Rep. Exch. 5; Law Rep. 4 Exch. 27.
(19) 41 Law J. Rep. Exch. 64; Law Rep. 7 Exch. 140.

pay the money, whereupon the Attorney-General appealed to this Court. It is suggested that by the statute the commissioners are made the sole and exclusive judges whether the money should, in the circumstances, be paid or not, and that there is no appeal from their decision. It was urged, further, that inasmuch as this money was paid to the commissioners as servants of the Crown for the Crown, no writ of *mandamus* should issue to them at all in any circumstances in respect of that money, and therefore that the Divisional Court had no jurisdiction to issue the *mandamus*. It was also contended on behalf of the Crown that, even assuming the Divisional Court to have had jurisdiction, still there is a rule of conduct which has always been, and ought to be, acted upon in the exercise by the Court of its discretion, and that a *mandamus* should not issue to the commissioners in respect of this claim, because if the claimant has any right at all, and even if this money ought, in the circumstances, to be repaid, he has another sufficient and reasonable remedy. On behalf of the claimant, it was argued that a *mandamus* ought to issue, because, it was alleged, there was in the circumstances a duty imposed upon the commissioners by Act of Parliament to pay back the sum claimed, and that wherever a duty is imposed upon particular persons, whether individually or as a body, if there is no other legal remedy a *mandamus* ought to be granted. It was urged that there was no legal remedy against these commissioners, unless it be by *mandamus*; and, in answer to the first point urged on behalf of the Crown—namely, that the sole decision in this case is entrusted to the commissioners—it was said that the meaning of the statute is not merely that they must be satisfied in fact, but that they are bound to repay the money if the circumstances are such that they ought to be satisfied.

So far as I understand the judgments of the Divisional Court, they decided three points—first, that there was a duty imposed by the statute upon the commissioners, in the circumstances of the case, to repay the money, or at all events that it appeared *prima facie* that the circumstances were such that they ought to repay it; secondly, that that was a duty from the commissioners to the claimant, who was therefore entitled to say that he had some right which he was entitled to insist upon as against them; thirdly, although that was so, yet that the claimant had no legal remedy, and therefore a *mandamus* should issue. They agreed with the contention of the claimant that the meaning of the statute is not merely that the commissioners must be satisfied in point of fact, but that the obligation on them is to pay the money if the circumstances are such that they ought to be satisfied. With regard to the governing rule of conduct imposed by the decisions upon the Queen's Bench Division—namely, that a *mandamus* should not be granted where there is any other reasonable and sufficient remedy—the Divisional Court construed it to mean any legal remedy; and they held that a petition of right is not a legal remedy within that proposition, because it depends upon the fiat of the Attorney-General being given. The question is whether we can agree with them upon any of these grounds, or upon such as will govern this case.

With regard to the first point, that this statute imposes upon the commissioners, not only a duty to pay the money in the circumstances of the case, but that it is a duty to the claimant: if by that it is meant that the statute raises a relation between the claimant and the commissioners, as a body or individually, to pay this money to him, it seems to me to follow that the claimant might maintain an action in which he would state that the statute had laid upon the commissioners an obligation to pay the money to him in certain circumstances. But if such an action would lie, a *mandamus* ought not to be granted, because the foundation of the application for a *mandamus* is that no such action will lie; and if it will not, it must be upon the ground that although the statute does impose upon the commissioners a duty, yet that is not a duty which raises any relation between them and the claimant. It is a duty, not to the claimant, but to some one else. To whom is the duty? This money is, by reason of 55 Geo. 3. c. 184. s. 2, not money paid to these com-

missioners themselves, either officially or individually. In terms it is money paid to and for the use of the Crown. Therefore it is in fact to be paid to the commissioners only as the hands through which it is to pass to the Crown, and therefore it is paid to them merely as servants of and agents for the Crown. By the statute the Crown is entitled to make rules as to the mode in which the commissioners are to deal with the money paid to them, and that right has been exercised to the extent that the commissioners are directed to pay the money every day into the general fund of the country, and therefore, in contemplation of law, into the hands of the Crown. If that is so, the meaning of the statute which says that these servants of the Crown are to repay money which belongs to and is in the possession of the Crown, and is no longer in their actual possession, is that upon them, as such servants, there is imposed a statutory duty to the Crown. The statute also enables them, without an order, in any particular case to obtain the money from some other department of the executive (which is still obtaining it from the Crown), and to take it back from the general fund and pay it to such claimants as may make out their claims. Therefore the right claim (if any) is against the Crown in respect of moneys in the hands of and belonging to the Crown. If so, no action will lie, because an action is not maintainable against the servants of the Crown. The statute gives no individual an action against the commissioners, because it raises no relation between the claimant and them. Therefore the claim must be against the Crown. But no action will lie against the Crown, although a petition of right may be presented. If, therefore, the claimant has any remedy at all in this case, it must be by petition of right. I say if he has any remedy at all, because if the true construction of the statute is that the right to repayment depends upon whether the commissioners are satisfied in fact—that is, whether they are the ultimate and sole judges whether the money should be returned—then not even a petition of right can be presented. It is not necessary to decide whether the commissioners have such a power or not. Speaking for myself, I must say that I should be loth to hold that that was so, and that there was no remedy for persons in the position of the claimant. But no action or suit will lie, because the money is in the hands of the Crown; and if it can be got back, it must be from the Crown. If there is any remedy—that is, if the exclusive power of dealing with this matter is not in the hands of the commissioners—I can see no reason why a petition of right should not be presented to the Crown, upon the ground that the money is in the hands of the Crown and should be paid back. If that petition is tried, it would be for the Crown, by demurrer or otherwise, to say that it cannot be maintained.

Then comes the question whether, assuming a petition of right to be the proper remedy, we can agree with the Divisional Court that because an action will not lie a *mandamus* ought to be issued. Both Judges seem to have decided in favour of the claimant, and to have said that although a petition of right can be presented, yet inasmuch as it is not an absolute legal remedy, because it is not known to the common law as a legal writ, and it requires the fiat of the Attorney-General, therefore it is not within the rule governing the discretion of the Queen's Bench Division, and a *mandamus* ought to issue if it is asked for. That depends upon what is the true rule as to the discretion of the Queen's Bench Division. That rule seems to me to have been clearly laid down by Lord Mansfield in *The King* v. *The Bank of England* (15), namely, "When there is no specific remedy, the Court will grant a *mandamus*, that justice may be done"; that is, in cases where justice cannot be done unless a *mandamus* will issue. If a petition of right is not a specific remedy known to the common law, it is not within the writs known to the common law, and then undoubtedly it is not an absolute legal remedy. If you enlarge the proposition to mean a legal or equitable remedy, to which a party is entitled without leave from any one, still on the assumption already made it is not even within that enlargement. Assuming the claim to be against the Crown, the only remedy, if any, is by petition of right; and that raises the question whether

a petition of right is a specific remedy within the proposition of Lord Mansfield. It is said that it is not, because it depends upon the fiat of the Attorney-General. But he is a judicial as well as an executive officer, and is counsel to the Crown. It is therefore to be assumed that he will exercise his functions properly. Now there is a known rule of conduct for the Attorney-General, as there is in the case of the exercise of a judicial discretion: and if there is any reasonable doubt as to a claim against the Crown, and if the claim be not frivolous, he will grant his fiat. We have heard in this case that there is no difficulty in obtaining it. Therefore, to say that a petition of right is not a specific remedy by which justice can be done, on the mere ground that it requires a fiat the granting of which depends upon a judicial discretion existing in the Attorney-General, is unfounded. It might have been said at one time that, although a petition of right was a specific remedy, yet justice could not have been satisfactorily obtained by it, owing to the uncertainty of the procedure; but after Bovill's Act was passed regulating the procedure, no one can say judicially that justice cannot be satisfactorily obtained by means of a petition of right. So far from that being the case, it seems to me that by reason of that Act a petition of right has at least become a more satisfactory mode of procedure than a *mandamus*, because many things may be done and powers exercised on a petition of right which certainly could not be exercised in the case of a *mandamus* and a return. If that is so, I think the remedy which can be obtained by petition of right is a specific remedy by which justice can be satisfactorily done.

If so, is the rule that which Mr. Justice Day has very stringently laid down—that a *mandamus* is only to be refused where there is another absolute legal remedy? Is it not rather true that a petition of right is a specific remedy by which justice can be done? Is not that just as much within the principle of the rule as a case in which some other remedy might be obtained? It seems to me that it is, and that the true proposition is that laid down by Lord Mansfield, and that it is not subject to the further restriction imposed by Mr. Justice Day: and that where there is no specific remedy by which justice can be done, the Court will grant a *mandamus*, but where there is such a remedy by which the subject will get a judicial decision of the Courts, if he is entitled to it, a *mandamus* should not issue. I am of opinion that a petition of right will enable a subject to obtain satisfaction by means of a decision of the Courts of this country, and therefore that it is within the rule. It follows, therefore, that where a petition of right can be obtained, no *mandamus* will lie. In the, to my mind, impossible case of the Attorney-General refusing the fiat, I leave it open whether the Queen's Bench might or might not issue a *mandamus*. Therefore I cannot agree with the decision appealed from; and inasmuch as a petition of right could certainly have been obtained to try this claim, and it is obvious that, as this is not a frivolous claim, the Attorney-General would have granted his fiat, I am of opinion that a *mandamus* was not a proper remedy, and that the proper remedy was a petition of right.

As to the three cases cited, in which I think it is true that a *mandamus* did issue to the commissioners, I think they have been sufficiently explained by shewing that either the attention of the Court was not called to the point, or that when it was the Court did not overrule the objection of the Crown, but expressed an opinion although it was unnecessary to give a decision on the point. As to the case of *The King* v. *The Lords of the Treasury* (3), I think I may say that I cannot agree with it. It is put upon the ground that there was a relation of depositor and depositary established; that is, that although the money had been paid by the Crown into the hands of the commissioners (it never having been the money of the claimant), the commissioners by their acts had what in common law would be called attorned to the claimant and agreed to hold the money for him. In coming to that conclusion the Court shewed that he could have maintained an action for money had and received, so that of course a *mandamus* ought not to have issued. I cannot agree that it was a proper decision on the grounds put by the Court. If it can be upheld as an authority that a *mandamus* will lie where the rela-

tion has been established by the acts of the commissioners, it is not an authority for saying that where, as here, such relation has not been raised, a *mandamus* will lie.

BOWEN, L.J.—I am of opinion that the appeal must be allowed. This is a claim for a return of duty which has been paid to the Commissioners of Inland Revenue in respect of probate, and the applicant maintains that the money ought to be repaid on the ground that he has as executor paid debts out of the personal estate, and therefore the duty paid does not belong to the Crown. The first difficulty is whether the executor is bound by the conclusion of the commissioners on a claim being put forward for a return of a portion of the money under 5 & 6 Vict. c. 79. s. 23? Has he any remedy if they choose not to be satisfied? That is not an easy point. There are many public bodies by whose decision a claimant is bound. There are many executive bodies which are constituted by statute the sole judges in particular instances of what is to be done. Of course, it is to be remembered that the claim of the executor is not merely to public money, but to his own money in the hands of the Crown; and it would be reasonable to put on the section such a construction as would not conclude the applicant in every case by the opinion of the commissioners. It may be that there is a mode of reviewing the decision of the commissioners, especially upon a point of law. I do not decide the point; but, assuming the executor to be entitled to some remedy, and not to be bound by what the commissioners have said, what is the remedy? In the first instance the money has been paid to the commissioners, who have not retained it, but, according to the directions given to them, have paid it to the Crown; and although the statute requires them to return the money which ought to have been deducted in the first instance, but which has been paid until the claim should be made good, there are two ways of construing that—namely, it either makes it their duty to get the money from the Crown and to return it to the claimant, or it creates an immediate duty to pay back the amount received in excess. Many difficulties present themselves, according to the view of the respondent. It is not a common thing for commissioners holding public money to be liable by statute to pay the money to claimants, because the result of such legislation would, in many cases, be to place it at the mercy of a jury to say how the functions of the commissioners should be performed. The second difficulty is that the commissioners have paid the money to the Crown, and may not have in their hands funds applicable to the claim. In substance the money has been paid, not to the commissioners, but to the Crown, and I very much doubt whether, in any circumstances, a *mandamus* would be the right remedy in such a case; but I will not pronounce an opinion on that point.

To my mind, there is a clear remedy by petition of right. The money is in the hands of the Crown, and there is an old constitutional way by which subjects are able to obtain back money from the hands of the Crown—namely, by petition of right. If that is a true view, and a petition of right is the proper remedy and a *mandamus* is not, of course the appeal must succeed, because a *mandamus* has been directed to the wrong persons: it cannot be directed to the Crown, and the commissioners have not the money. But assuming for the purpose of argument what is possible as a matter of reasoning, that there might be a double remedy in consequence of the construction of the statute, and that the money may be got back from the Crown by petition of right, and there is a duty upon the commissioners to pay back the money immediately, ought a *mandamus* to issue in such a case? What is the right which any man has to ask a Court for a writ of *mandamus*? The writ of *mandamus* is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound not to delay or prevent any one from obtaining justice. If there is no other means of obtaining justice a *mandamus* is granted. But the procedure is cumbrous and expensive; and from time immemorial the Courts have never granted the writ when there is another more feasible remedy. But a petition of right is as good a means of getting justice against the Crown as can be conceived. All the pro-

a petition of right is a specific remedy within the proposition of Lord Mansfield. It is said that it is not, because it depends upon the fiat of the Attorney-General. But he is a judicial as well as an executive officer, and is counsel for the Crown. It is therefore to be assumed that he will exercise his functions properly. Now there is a known rule of practice in the case of the Attorney-General, and if there is any reason for saying that a claim against the Crown is frivolous, or to be not frivolous, the claim is frivolous. We have here a claim which is *bona fide*, and I have no difficulty in saying that the fiat ought not to be granted; moreover, the Attorney-General pointed out in the Court below that a petition of right was the ordinary remedy, indicating that the Crown would not oppose any application for a fiat. So far from saying that a *mandamus* is wanted to supply a defect of justice, it would be more true to say that to grant it would be to create a defect of justice, because the case would be tried without the means of arriving at the truth. As to the case of *The King* v. *The Lords of the Treasury* (3), I agree with what the Master of the Rolls has said with reference to it.

Appeal allowed, with costs.

Solicitors — W. H. Melville, for appellants; Denton, Hall & Burgin, for respondents.

1884. Feb. 15.

THE QUEEN *v.* PRICE.

Cremation — Dead Body — Misdemeanour — Nuisance — Inquest — Preventing Inquest being held.

[For the report of the above case, see 53 Law J. Rep. M.C. 51.]

Day: and the remedy by Petition of Right in the Court below was the ordinary remedy, indicating that the Crown would not oppose any application for a fiat. So far from saying that a *mandamus* is wanted to supply a defect of justice, it would be more true to say that to grant it would be to create a defect of justice, because the case would be tried without the means of arriving at the truth. As to the case of *The King* v. *The Lords of the Treasury* (3), I agree with what the Master of the Rolls has said with reference to it.

Appeal allowed, with costs.

Solicitors — W. H. Melville, for appellants; Denton, Hall & Burgin, for respondents.

1884. Feb. 15.

THE CENTRAL NEWS COMPANY *v.* THE EASTERN NEWS TELEGRAPH COMPANY AND OTHERS.

Practice — Discovery by Person not a Party to the Action — Rules of Court, 1883 — Order XXXVII. rule 7.

By Order XXXVII. rule 7 of the Rules of Court, 1883, the Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person, for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial.

In an action brought by the plaintiffs against the defendants for an improper use and publication of certain telegrams transmitted by them to the plaintiffs, the defendants applied, under Order XXXVII. rule 7, for the production of certain documents belonging to and in the possession of the Electric News Telegraph Company, who were not parties to the action, with a view of shewing that the news contained in the telegrams had been communicated by the plaintiffs to such company, and by them made public prior to the time at which such news was published by the defendants. The defendants contended that the production of the documents in question would simplify the proceedings at the trial and save expense: — Held, *that the power conferred on the Court was one which, if it existed, should be exercised with extreme caution, and that no sufficient ground had been shewn for the production of the documents asked for.*

This was an application on the part of the defendants to an action for an order that the Electric News Telegraph Company, who were not parties to the action, should, by their secretary or other proper officer, produce to the Master and to the said defendants their tapes of all news transmitted by them to their subscribers on the 9th, 12th and 13th of September, 1882; and also produce all books and papers shewing the receipt on those days of messages from the plaintiffs, and the times of the receipt and publication of such messages.

The plaintiffs, who were a company established to carry on business as purveyors of news and to supply telegrams containing

intelligence to newspaper proprietors and others, brought this action against the defendants for an improper use and publication of certain telegrams transmitted by one of the defendants, the Eastern News Telegraph Company, from the special correspondents appointed by the plaintiffs and sent out from England for the purpose of obtaining and transmitting to the plaintiffs the earliest intelligence as to the course of events in Egypt. The plaintiffs alleged, as a consequence, that they lost the benefit of the telegrams by reason of the contents thereof being made public by the defendants before the plaintiffs supplied them to their own customers.

It appeared from the affidavits in support of the application that the Electric News Telegraph Company supplied news to clubs and others by means of private telegraph wires working printing instruments on the subscribers' premises, so that the news supplied by them is printed on continuous tapes by the subscribers' instruments. At the date of the telegrams in respect of which the action was brought the news supplied by the Electric News Telegraph Company relating to affairs in Egypt was largely derived from the plaintiffs, and the news contained in such telegrams was communicated by the plaintiffs to the said Electric News Telegraph Company, and by them published to their subscribers very shortly after the receipt of the same by the plaintiffs. The defendants alleged that a material portion of their defence would consist in shewing that the news contained in the telegrams was published by the plaintiffs themselves prior to the time at which it was alleged to have been published by the defendants, and that, in fact, at the time of the alleged publication such news was publicly known, and that it was consequently very important for them to shew the exact times at which the contents were received by the Electric News Telegraph Company, and by them transmitted to their subscribers. The defendants further alleged that the times when the telegrams were received would appear from the books of the Electric News Telegraph Company, in which the hour of their receipt would be recorded, and that the contents of such telegrams would appear from the tapes.

Mathew, J., at chambers, having refused the application, the defendants appealed.

Charles Russell, Q.C., *Moulton* and *Pyke*, in support of the appeal.—The documents in question are of the greatest importance to the defendants, and there can be no doubt that at the trial witnesses from the Electric News Telegraph Company could be compelled to produce them. This is, therefore, only an application that they shall be called upon before the trial to produce documents which they can be compelled to produce at the trial. The production of these tapes would be the means of saving considerable expense at the trial, and can cause no injustice or injury to the party from whom the inspection is sought. The very object of Order XXXVII. rule 7 (1) of the Rules of Court, 1883, which extended the powers conferred by 1 Will. 4. c. 42, and 17 & 18 Vict. c. 125, was to admit of an application like the present being made, and the power given is quite general.

Cyril Dodd, for the respondents, was not called upon to argue.

LORD COLERIDGE, C.J.—The rule upon which the argument has been based is a combination of two previous ones. The earlier Act of Parliament enabled witnesses to be examined and documents to be produced in cases where it was essential in the interests of justice that such an examination or production should take place. The Common Law Procedure Act added a power to do that which the earlier Act permitted for the purposes of a motion. The Rules of 1883 have naturally enough incorporated both powers, and have omitted the restriction imposed by the two earlier Acts. It is not necessary, in this particular case, to decide whether we have jurisdiction to grant the application which is now made

(1) By the Rules of Court, 1883, Order XXXVII. rule 7, "The Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court or Judge may think fit to be produced: provided that no person shall be compelled to produce, under any such order, any writing or other document which he could not be compelled to produce at the hearing or trial."

to us, though I confess I do not see any ground for doubting that the Court has power to make such an order. Assuming, however, that the power exists, I am clearly of opinion that this is not a case in which the power should be exercised. The rule is one which is capable of being applied in furtherance of the most oppressive and inquisitorial proceedings, and any application for the exercise of its powers should be granted with the most watchful jealousy. Without saying that the Court would not, in a proper case, make such an order, it would, in my judgment, be extremely oppressive to hold that, whenever it might tend to the convenience of one of the parties to an action or saving of expense, a person not a party to the cause, nor yet a witness, and having in fact nothing to do with the action, should be compelled by process of the Court to produce his private and secret papers for the purpose of some matter connected with a suit in which he has no interest. The power is one the free exercise of which would be extremely dangerous, and I cannot help observing that it may be, after all, that the inspection of these tapes would neither save expense nor simplify the proceedings at the trial of the action. It is a mere attempt on the part of the defendants to obtain, through the process of the Court, the production of private documents which may or may not contain information beneficial to the defendants. There ought, in my judgment, to be a very strong case made out to justify the exercise of such a power, and no such case has been made out here. There are probably a number of different places where inspection of these tapes may be had without taking the trouble to come to the Court to make such an order as this; and as I think that the case is one in which no sufficient ground has been shewn for ordering the production of the documents in question, I am of opinion that the application ought to be refused.

WILLIAMS, J.—I also think that this appeal should be dismissed. The application is to compel a stranger to the action to produce documents belonging to him and in his exclusive possession. The language of the rule upon which the present question turns is undoubtedly extremely wide, and I am far from saying that the Court has not the power to grant the application; there is no limitation or qualification in the rule. Before that rule there were two statutes which regulated the practice—namely, 1 Will. 4. c. 42. s. 5, and the Common Law Procedure Act, 1854, ss. 46 and 47; and it is not disputed that under these statutes no such power existed. It may possibly be that an applicant hereafter may find himself in this difficulty, whether, if the new rules do confer this power over perfect strangers, such rules are not altogether *ultra vires*. It is not, however, necessary to determine the point in this case; for, assuming the power to exist, the case is not one where it ought to be exercised. Such a power should, in my judgment, be exercised with extreme jealousy, or otherwise it would become too oppressive to be endured. If the case was one in which a defendant had written a letter to a third party, and in which such a defendant had an interest, I can well understand that it might not be improper to order its production. But to make an order on a perfect stranger to produce documents, on the mere suggestion that a party to an action may derive some benefit from their production, would, in my judgment, be too oppressive a proceeding to be endured. I think, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors—Bompas, Bischoff & Dodgson, and Bircham & Co., for appellants; Rollit & Sons, and C. J. Smith, for respondents.

1884. Feb. 23. } POINTON AND BOOT (*appellants*) *v.* HILL (*respondent*).

Idle and Disorderly Person—Begging—Special Occasion—5 *Geo.* 4. *c.* 83. *s.* 3.

[For the report of the above case, see 53 Law J. Rep. M.C. 62.]

[IN THE HOUSE OF LORDS.]

1883. Nov. 13, 14, 15. Dec. 3. } COOMBER *v.* THE JUSTICES OF THE COUNTY OF BERKS.

Revenue—Property Tax—Assize Courts—5 & 6 Will. 4. c. 35—16 & 17 Vict. c. 34.

Property tax under schedules A and B of the Income Tax Acts is not payable in respect of buildings erected by county Justices and vested in the clerk of the peace of the county to be used as assize courts with their appurtenances and a county police station, notwithstanding that they may have been occasionally lent gratuitously for the holding of meetings or for other like purposes.

This was an appeal from a decision of the Court of Appeal which affirmed one of the Queen's Bench Division.

The question, which arose upon a Case stated by the Commissioners of Income Tax under Part III. of 37 Vict. c. 16, was, whether the Justices of Berkshire were liable to property tax in respect of buildings at Reading occupied as assize courts, a police station, and other subsidiary offices and accommodation.

The Courts below held that they were not.

The judgments of the Courts below are reported 51 Law J. Rep. Q.B. 297 (where the case is set out in full); 52 ibid. 81; Law Rep. 9 Q.B. D. 17; 10 ibid. 267.

The Attorney-General (*Sir H. James, Q.C.*) and *The Lord Advocate* (*Balfour, Q.C.*), (*A. V. Dicey* with them), for the appellant.—There is no English authority as to the liability to income tax of assize courts and such buildings. The Courts below have held, upon the analogy of poor rates, that they are not liable. There is a direct decision to the contrary in Scotland—*Clerk* v. *The Dumfries Commissioners of Supply* (1). This appeal is to settle the law for both countries.

The statute 42 & 43 Vict. c. 21 (Customs and Inland Revenue Act, 1879), s. 15, under which the assessment is made, makes the tax payable on "all property, profits and gains" mentioned in 16 & 17 Vict. c. 34. The title of the latter Act speaks only of "duties on profits"; but schedule A shews the subject-matter of the assessment—namely, property in respect of annual value. The question, then, is not whether the property actually produces profit, but whether it is capable of doing so. Section 5 of 16 & 17 Vict. c. 34, refers back for the manner of assessment to 5 & 6 Vict. c. 35, which, by No. 1 of the rules following section 60, directs the duty to be charged on all property "capable of actual occupation" though not actually let. No. 6 in section 61 gives the exceptions, which do not include the present case. The words in rule No. 1 were intended to enlarge the operation of the Act; there were no like words in 43 Geo. 3. c. 122. See also section 70 and section 63, rule No. 9, of 5 & 6 Vict. c. 35.

These buildings are, within rule 1, capable of actual occupation, and not within the exceptions; they are therefore *prima facie* assessable. Why are they not to be assessed? The respondents rely on the analogy of poor rates, and treat the case as decided by *The Mersey Docks Cases* (2); but the analogy does not hold. The rate is levied on the occupier, and it was held that where the Crown is occupier the rate cannot be levied, because the Crown was not named in the Acts, and therefore not bound by them. Here the tax is levied on the owner, and whether or not the Crown can be said to occupy the buildings, it is not the owner. The Justices have power to hire buildings for assize courts, and sometimes do so; where they do, the owner undoubtedly must pay income tax on the rent he receives, and that tax indirectly falls on the tenant. Why should the liability of the property to income tax depend on whether the Justices hire or buy it? Again, the case of poor rates is not the same as that of income tax. The latter is payable to the Crown, and the principle on which *The Mersey Docks Cases* (2) went, that the Crown is not bound by an Act unless named, has no application, where the Crown is seeking a benefit, not endeavouring to avoid a burden.

(1) 7 Sess. Cas. (4th ser.) 1157.

(2) 11 H.L. Cas. 443; 35 Law J. Rep. M.C. 1.

Coomber v. *Justices of Berks, H.L.*

Even as regards poor rates there is no direct authority that buildings of this description are exempt. The decisions in *The Mersey Docks Cases* (2) were in favour of the rate, there were only *dicta* as to assize courts. It is true that they have been acted on ever since; but the fact that ratepayers and assessors have not raised the question against the Crown cannot make their opinion *communis error* so as to bind the Crown on the construction of another Act of Parliament. The case as to income tax could not have been raised in the Courts until 1874, and there was no appeal to the House of Lords till 1876. The practice in fact has varied, and there are but two decisions of the Courts, the present case in England, and one in Scotland (*Clerk* v. *The Dumfries Commissioners of Supply* (1)), which are at variance with one another.

Even if the assize court portion be exempt, the police station part is not; the property must be used "exclusively in and for the service of the Crown"—*Greig* v. *The University of Edinburgh* (3).

The following cases were also referred to: *Bent* v. *Roberts* (4), *The Justices of Lancashire* v. *Cheetham* (5) and *The Attorney-General* v. *Earl of Sefton* (6).

H. Matthews, Q.C., and *Gorst, Q.C.*, for the respondents.—The occupier, not the owner, is liable under schedule A—see 5 & 6 Vict. c. 35. s. 63, No. 9, rule 1, and sections 73 and 172. Even where there is no occupier no direct remedy against the owner is given; there is merely a power of distress from time to time. Here the Crown is the occupier, or there is none.

As to whether the assize courts and police buildings are occupied for Crown purposes see *The Justices of Lancashire* v. *Stretford* (7). The administration of justice and police have always been considered peculiarly the province of the central government. They are not matters of local government, but of local administration of central government. In the metropolis the police are managed by the central government, and it can make no difference that elsewhere a different system is in force. The Justices are appointed by the Crown, and the police are under the control of the Secretary of State. The exemption of assize courts from rates has been treated as settled by *The Mersey Docks Cases* (2)—see *The Queen* v. *St. Martin's, Leicester*, (8) and *The Queen* v. *M'Cann* (9). The Justices have no power to let the building for other purposes—see 7 Geo. 4. c. 63 and 21 & 22 Vict. c. 92. s. 3.

The Lord Advocate (*Balfour, Q.C.*), in reply.—*The Justices of Lancashire* v. *Stretford* (7) was decided on the ground, which has since been held invalid in *The Mersey Docks Cases* (2), that mere use for any public purpose gave exemption. *The Queen* v. *St. Martin's, Leicester*, (8) is inconsistent with *Clerk* v. *The Dumfries Commissioners of Supply* (1).

Cur. adv. vult.

Lord Blackburn (on Dec. 3).—The commissioners for general purposes of the income tax having determined, on appeal by the now respondents, that certain buildings were not properly assessable to income tax, the now appellant required the commissioners to state a Case, which was done. On that Case the Queen's Bench Division, Revenue side, on the 24th of March, 1882, made this order:—"The Court are of opinion that the buildings described in the assessment of income tax for the year 1879-80 for the parish of St. Laurence, Reading, as assize courts, &c., are not properly assessable to income tax, and affirm the determination of the said commissioners. And do order that the costs of the said respondents of this appeal, including the costs of and occasioned by the amendment of the said case, be paid to them by the said appellant. And it is hereby referred to the Queen's Remembrancer to tax such costs."

The now appellant, under the power given by statute 41 Vict. c. 15. s. 15,

(3) Law Rep. 1 H.L. Sc. 348.
(4) 47 Law J. Rep. Exch. 112; Law Rep. 3 Ex. D. 66.
(5) 37. Law J. Rep. M.C. 12; Law Rep. 3 Q.B. 14.
(6) 34 Law J. Rep. Exch. 98.
(7) E., B. & E. 225; 27 Law J. Rep. M.C. 209.
(8) 8 B. & S. 536; 36 Law J. Rep. M.C. 99; Law Rep. 2 Q.B. 493.
(9) 9 B. & S. 33, 44; 37 Law J. Rep. M.C. 25, 123; Law Rep. 3 Q.B. 141, 677.

appealed to the Court of Appeal. And this order was made: "In Her Majesty's Court of Appeal, Thursday, the 21st day of December, 1882, Richard Coomber (surveyor of taxes), appellant, and the Justices of the county of Berks, respondents. On appeal by the appellant from an order of the High Court of Justice, Queen's Bench Division, Revenue side, dated the 24th day of March, 1882. Upon reading, on the 29th and 30th days of November last, the above-mentioned order, and the notice of appeal herein, and on hearing Mr. A. V. Dicey of counsel for the appellant, and Henry Matthews, Esquire, Q.C., and J. E. Gorst, Esquire, Q.C., for the respondents, and Sir Farrer Herschell, Knight, Her Majesty's Solicitor-General, in reply, the matter was adjourned for judgment until this day. Now, it is ordered by the Court that the said order of the 24th day of March last be and the same is hereby confirmed. And it is further ordered that the costs of this appeal be paid by the said appellant to the said respondents. And it is hereby referred to the Queen's Remembrancer to tax such costs."

From this order there has been an appeal to this House; and the question, therefore, now to be determined is whether the original order of the Queen's Bench Division is right.

The jurisdiction to determine on such a case was originally created by 37 Vict. c. 16. s. 10. The Court were required to determine the "questions of law arising on the case."

The case shews that the buildings in question were built on land purchased under the authority of public Acts by the county, and paid for out of the county rates; that on it the buildings, or rather one building, was erected to answer the double purpose of being an assize court and a police station. The Case states various details as to how they are occupied, on which some minor points are raised, with which I shall deal hereafter. But the main facts are clear—that the buildings were required *bona fide* for the purpose of fulfilling the duty cast on the county in aid of the general government, of having courts and having a police station, and that no revenue is derived from them. Does this, assuming for the present that the buildings are not more than is required for those purposes, bring them within the implied exemption by virtue of the prerogative?

In *The King* v. *Cook* (10) the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post-horses was exigible in respect of post-horses carrying an express from the Governor of Portsmouth to one of His Majesty's principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concerns of this kingdom. It was held that it was not exigible. Lord Kenyon, delivering the judgment of the Court, says, "Now, although there is no special exemption of the King in this Act of Parliament (25 Geo. 3. c. 51), yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43 Eliz., and every other Act imposing a duty or tax on the subject." There may well be expressions in an Act imposing a duty or tax on the subject such as to shew that the intention of the Legislature was to impose the duty on some property belonging to the Crown. But I do not think it made out that there is any such intention shewn in the Income Tax Act. Reliance was placed in the argument on the general words of the rule, "which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation of whatever nature, and for whatever purpose occupied or enjoyed." But I do not think this can be construed as taking away the exemption, by virtue of the prerogative, of property actually occupied or enjoyed by the Crown.

Lord Mure, in the Scotch case of *Clerk* v. *The Dumfries Commissioners of Supply* (1), seems to have been struck by the 8th rule under No. IV.: "The duty to be charged in respect of any house, tenement or apartment belonging to Her Majesty in the occupation of any officer of Her Majesty in right of his office or otherwise (except apartments in Her Majesty's royal palaces) shall be charged on and paid by

(10) 3 Term Rep. 519.

the occupier of such house, tenement or apartment upon the annual value thereof." As the tax is imposed on the salary of such officers, it was most reasonable to provide that, where the salary was partly paid by a rent-free house, the officer should pay the tax on that house; but I cannot think that affords any ground for saying that the Legislature intended to impose the tax on Crown property generally, so as to take away the exemption that would otherwise be implied. I should rather infer that those who framed the Act thought that, unless expressly named, such an occupation would have been exempted.

It is on the application of this general principle to the facts stated in the Case that, in my opinion, the whole difficulty of the case arises.

I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of government, or that by the constitution of this country these functions do, of common right, belong to the Crown.

In England a subject may have a franchise, giving him the right to administer justice in a particular locality in courts held by him; and he may also have a right to name the constables. In early times such local franchises were of value for the revenue derived from the fees, and, no doubt, as increasing the local influence of the grantee. But it was always held that on a proceeding *in quo warranto*, the Crown could call on the person in possession of such a franchise to shew his title, on the ground that they were among the matters *quæ mere spectant ad regem*, and that unless he shewed a title by grant from the Crown, or by prescription, the franchises were seized and he was ousted. (See *Comyn's Digest*, "*Quo warranto*" A, and the authorities there collected.) In the present case there is no question raised as to any franchise in the hands of a subject.

From very early times Judges, acting under the King's commission, went down to administer justice in counties. The sheriff, the head officer of the county, but appointed by the Crown, was always called upon to attend them and to provide lodging and accommodation for them. He did this at the cost of the county. I do not stop to enquire by what machinery the cost was in early times defrayed. It is now provided for by the statutes referred to, and comes out of the county rate.

The sheriff also was bound to raise the hue and cry, and call out the *posse comitatus* of the county whenever it was necessary for any police purposes; in so doing he was acting for the Crown, but the burthen fell on the inhabitants of the county. By modern legislation the county police are arrayed at the expense of the county, defrayed by a police rate on the county, supplemented, in some cases, by grants from the imperial revenues.

There had been a considerable number of decisions on the poor rate, which laid down a much wider principle than that laid down in *The King* v. *Cook* (10)—namely, that whenever property was occupied for "public purposes" it was exempted from poor rate. In *The Mersey Docks* v. *Cameron* (2) it was decided by this House that the exemption to such an extent could not be supported. But, whilst this was decided, it was not said that all the cases which established exemptions on the ground indicated in *The King* v. *Cook* (10) were wrong. The passage at pages 464 and 465, in the opinion of the majority of the Judges, which I delivered, and which has been so often quoted, shews that those who joined in that opinion thought that many of them—such as those deciding that buildings occupied by the Post Office, the Horse Guards, or the Admiralty, were exempt—were obviously right, and that those which decided that buildings occupied for police and for the assize courts were exempt, though not so obviously right, were capable of being supported on a ground that did not touch the case then before the House. I do not think that opinion can be properly cited as an authority that those cases were rightly decided, but certainly their authority was not weakened by anything said in that opinion.

The House, in *The Mersey Docks* v. *Cameron* (2), did not decide that those cases to which I have referred were rightly decided; but the language of the Lord

Chancellor (Lord Westbury), at p. 505, seems to me to add to their authority. He there says that the public purposes, to make an exemption, "must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown"; and in *Greig* v. *The University of Edinburgh* (3) he more clearly shews what was his view by using this language: "Property occupied by the servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor rate." Lord Cranworth, by using the words "more or less sound," seems to me to guard against being supposed to decide that those cases which proceeded on this ground were all right in deciding that the purposes were those of the public government to such an extent as to bring them within the principle of *The King* v. *Cook* (10); but he certainly does not at all impeach them.

The Scotch cases on the Scotch poor law proceed on a similar ground. It has been pointed out that in the Scottish poor law half the poor rate is imposed on the owner in respect of property, and so far the case is more closely analogous to that of the income tax; but I think that whether the rate is exigible in respect of property or in respect of occupation, the ground of exemption must be the same—namely, as said by the Lord Chancellor (Cairns) in *Greig* v. *The University of Edinburgh* (3): "The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in or for the service of the Crown, is not rateable to the relief of the poor."

It was not necessary, however, to decide in that case, nor, I think, in any case in this House, that the exemption proceeded so far; all that was decided was that it did not go further. And I therefore do not think it can be considered as decided by this House that property held as this is would not be liable to the poor rate. I think it would not be open to a Court of first instance in England to hold that a uniform series of decisions extending over many years, and certainly not impeached, if not confirmed, by this House, are wrong; but it is open in this House to say so. But I cannot see sufficient reason for saying that they are wrong. I do not say that the assize courts, maintained by the county for the administration of the Queen's justice in the Queen's Court, are quite so clearly occupied by the servants of the Crown as those Courts which are maintained by the Woods and Forests out of the general revenue of the country. Nor do I say that the police station, maintained by the county for the maintenance of the police, is quite so clearly occupied by the servants of the Crown as a barrack maintained for soldiers and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the purposes of the administration, or those purposes of the Government which are, according to the theory of the Constitution, administered by the Sovereign.

If it was a new point whether buildings occupied for the purpose of county courts and county police were liable to be rated for the poor rate, I think there would be considerable force in the argument that the county occupying property in order to fulfil a duty to the Crown, which it is required to fulfil at its own expense, is not occupying it for the Government, or in the service of the Government. But as for many years property thus occupied has been uniformly held exempt from the poor rate, I do not think your Lordships ought now to hold that it is liable to poor rate.

It remains to be considered whether, if the county is not liable for poor rate in respect of the occupation, it may not be liable to the income tax in respect of the property or the occupation.

The decision of the First Division of the Court of Session in *Clerk* v. *The Dumfries Commissioners of Supply* (1) was much, and properly, relied on by the counsel for the appellant. There the question was whether the commissioners of supply were chargeable with income tax in respect of police stations erected under the 20 & 21 Vict. c. 72. If there be any difference between such police stations in Scotland, erected by commissioners of supply, and

a petition of right is a specific remedy within the proposition of Lord Mansfield. It is said that it is not, because it depends upon the fiat of the Attorney-General. But he is a judicial as well as an executive officer, and is counsel to the Crown. It is therefore to be assumed that he will exercise his functions properly. Now there is a known rule of conduct for the Attorney-General, as there is in the case of the exercise of a judicial discretion: and if there is any reasonable doubt as to a claim against the Crown, and if the claim be not frivolous, he will grant his fiat. We have heard in this case that there is no difficulty in obtaining it. Therefore, to say that a petition of right is not a specific remedy by which justice can be done, on the mere ground that it requires a fiat the granting of which depends upon a judicial discretion existing in the Attorney-General, is unfounded. It might have been said at one time that, although a petition of right was a specific remedy, yet justice could not have been satisfactorily obtained by it, owing to the uncertainty of the procedure; but after Bovill's Act was passed regulating the procedure, no one can say judicially that justice cannot be satisfactorily obtained by means of a petition of right. So far from that being the case, it seems to me that by reason of that Act a petition of right has at least become a more satisfactory mode of procedure than a *mandamus*, because many things may be done and powers exercised on a petition of right which certainly could not be exercised in the case of a *mandamus* and a return. If that is so, I think the remedy which can be obtained by petition of right is a specific remedy by which justice can be satisfactorily done.

If so, is the rule that which Mr. Justice Day has very stringently laid down—that a *mandamus* is only to be refused where there is another absolute legal remedy? Is it not rather true that a petition of right is a specific remedy by which justice can be done? Is not that just as much within the principle of the rule as a case in which some other remedy might be obtained? It seems to me that it is, and that the true proposition is that laid down by Lord Mansfield, and that it is not subject to the further restriction imposed by Mr. Justice Day: and that where there is no specific remedy by which justice can be done, the Court will grant a *mandamus*, but where there is such a remedy by which the subject will get a judicial decision of the Courts, if he is entitled to it, a *mandamus* should not issue. I am of opinion that a petition of right will enable a subject to obtain satisfaction by means of a decision of the Courts of this country, and therefore that it is within the rule. It follows, therefore, that where a petition of right can be obtained, no *mandamus* will lie. In the, to my mind, impossible case of the Attorney-General refusing the fiat, I leave it open whether the Queen's Bench might or might not issue a *mandamus*. Therefore I cannot agree with the decision appealed from; and inasmuch as a petition of right could certainly have been obtained to try this claim, and it is obvious that, as this is not a frivolous claim, the Attorney-General would have granted his fiat, I am of opinion that a *mandamus* was not a proper remedy, and that the proper remedy was a petition of right.

As to the three cases cited, in which I think it is true that a *mandamus* did issue to the commissioners, I think they have been sufficiently explained by shewing that either the attention of the Court was not called to the point, or that when it was the Court did not overrule the objection of the Crown, but expressed an opinion although it was unnecessary to give a decision on the point. As to the case of *The King* v. *The Lords of the Treasury* (3), I think I may say that I cannot agree with it. It is put upon the ground that there was a relation of depositor and depositary established; that is, that although the money had been paid by the Crown into the hands of the commissioners (it never having been the money of the claimant), the commissioners by their acts had what in common law would be called attorned to the claimant and agreed to hold the money for him. In coming to that conclusion the Court shewed that he could have maintained an action for money had and received, so that of course a *mandamus* ought not to have issued. I cannot agree that it was a proper decision on the grounds put by the Court. If it can be upheld as an authority that a *mandamus* will lie where the rela-

tion has been established by the acts of the commissioners, it is not an authority for saying that where, as here, such relation has not been raised, a *mandamus* will lie.

BOWEN, L.J.—I am of opinion that the appeal must be allowed. This is a claim for a return of duty which has been paid to the Commissioners of Inland Revenue in respect of probate, and the applicant maintains that the money ought to be repaid on the ground that he has as executor paid debts out of the personal estate, and therefore the duty paid does not belong to the Crown. The first difficulty is whether the executor is bound by the conclusion of the commissioners on a claim being put forward for a return of a portion of the money under 5 & 6 Vict. c. 79. s. 23? Has he any remedy if they choose not to be satisfied? That is not an easy point. There are many public bodies by whose decision a claimant is bound. There are many executive bodies which are constituted by statute the sole judges in particular instances of what is to be done. Of course, it is to be remembered that the claim of the executor is not merely to public money, but to his own money in the hands of the Crown; and it would be reasonable to put on the section such a construction as would not conclude the applicant in every case by the opinion of the commissioners. It may be that there is a mode of reviewing the decision of the commissioners, especially upon a point of law. I do not decide the point; but, assuming the executor to be entitled to some remedy, and not to be bound by what the commissioners have said, what is the remedy? In the first instance the money has been paid to the commissioners, who have not retained it, but, according to the directions given to them, have paid it to the Crown; and although the statute requires them to return the money which ought to have been deducted in the first instance, but which has been paid until the claim should be made good, there are two ways of construing that—namely, it either makes it their duty to get the money from the Crown and to return it to the claimant, or it creates an immediate duty to pay back the amount received in excess. Many difficulties present themselves, according to the view of the respondent. It is not a common thing for commissioners holding public money to be liable by statute to pay the money to claimants, because the result of such legislation would, in many cases, be to place it at the mercy of a jury to say how the functions of the commissioners should be performed. The second difficulty is that the commissioners have paid the money to the Crown, and may not have in their hands funds applicable to the claim. In substance the money has been paid, not to the commissioners, but to the Crown, and I very much doubt whether, in any circumstances, a *mandamus* would be the right remedy in such a case; but I will not pronounce an opinion on that point.

To my mind, there is a clear remedy by petition of right. The money is in the hands of the Crown, and there is an old constitutional way by which subjects are able to obtain back money from the hands of the Crown—namely, by petition of right. If that is a true view, and a petition of right is the proper remedy and a *mandamus* is not, of course the appeal must succeed, because a *mandamus* has been directed to the wrong persons: it cannot be directed to the Crown, and the commissioners have not the money. But assuming for the purpose of argument what is possible as a matter of reasoning, that there might be a double remedy in consequence of the construction of the statute, and that the money may be got back from the Crown by petition of right, and there is a duty upon the commissioners to pay back the money immediately, ought a *mandamus* to issue in such a case? What is the right which any man has to ask a Court for a writ of *mandamus*? The writ of *mandamus* is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound not to delay or prevent any one from obtaining justice. If there is no other means of obtaining justice a *mandamus* is granted. But the procedure is cumbrous and expensive; and from time immemorial the Courts have never granted the writ when there is another more feasible remedy. But a petition of right is as good a means of getting justice against the Crown as can be conceived. All the pro-

immediate and actual servants of the Crown, but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country. And seeing that, in my opinion, the administration of justice, the maintenance of order and the repression of crime, are among the primary and inalienable functions of a constitutional Government, I have no hesitation in holding that assize courts and police stations have been erected for proper Government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities.

Lord Chelmsford does not, indeed, say that those cases (which were not conflicting) were originally well decided; but I conclude, from the terms in which he refers to the opinion of Chief Justice Tindal in *Crease* v. *Sawle* (18), that, even if his Lordship had thought they were not, he would have upheld their authority. On the other hand, it appears to me that Lord Cranworth, although he does make use of the expression "more or less sound," meant to express approval of the principles upon which these cases were decided; and I am confirmed in that impression by the fact that his Lordship subsequently stated his entire agreement with the opinion of the Lord Chancellor (Cairns) (which has already been cited by my noble and learned friend) in *Greig* v. *The University of Edinburgh* (3). The rule laid down by Earl Cairns in that case is, in substance, the same as that stated by Lord Westbury in the case of *The Mersey Docks* (2).

It was argued, however, that the authorities to which I have referred have no application to the question with which the House has to deal, for two reasons: first, because the assessment for the relief of the poor is imposed upon occupation, whereas property is the basis upon which the income tax is levied; and, in the second place, because the ratio of these authorities is limited to the case of a local rate, and ought not to be extended to the case of an imperial tax.

I confess that I had great difficulty in following the argument founded upon the supposed difference in principle (as regards the limits of Crown privilege) between an assessment on occupation and an assessment on property. I did not hear from the bar, and I have been unable to discover for myself, any good reason why a person vested with the legal estate, but whose right is that of a bare fiduciary holding the premises for proper Government uses, should be less entitled to plead the privileges of the Crown than one who occupies for the same purposes. In *The Clyde Navigation Trustees* v. *Adamson* (19), which was decided upon the same day on which judgment was given in *The Mersey Docks Case* (2), the trustees were the legal owners as well as occupiers of the premises sought to be rated to the poor by the city parish of Glasgow, and they claimed exemption on the ground that any property vested in them was so vested in them as trustees for public purposes. The Lord Chancellor (Westbury), in his judgment, points out that by the General Poor Law Act for Scotland (8 & 9 Vict. c. 83), the assessment is imposed, one half upon owners and one half upon the tenants and occupiers of all lands and heritages within the parish; and his Lordship then goes on to state that the question raised by the trustees, in answer to the demand that they should be rated for the poor, was "precisely the same as the question raised by *The Mersey Docks and Harbour Trustees* (2)." The same view was taken by the House in the subsequent Scotch case of *Greig* v. *The University of Edinburgh* (3).

But it was next said that all the decisions founded on by the respondents, in which the occupiers of property used for *quasi* Government purposes have been held exempt from taxation, refer to local rating for the poor, and therefore decide nothing as to exemptions from general rates, such as the income tax. It was accordingly argued for the appellant that your Lordships are free in this case to consider all questions as to the proper extent and limit of Crown privilege as if these had now arisen for the first time for decision. The statement, in point of fact,

(18) 2 Q.B. Rep. 862, 885.

(19) 4 Macq. H.L. 931.

upon which that argument was rested is not strictly accurate, because, as has been pointed out by my noble and learned friend, the Court, in *The King* v. *Cook* (10), gave effect to the privilege of the Crown, not in the case of a local but of a general tax, holding that such privilege extended, not only to the Act of Elizabeth, but to every Act imposing a tax upon the subjects of the Crown. But I should have been prepared to hold, apart from the authority of that case, that the appellant's contestation upon this point is untenable.

The exemption of the Crown from the incidence of rating statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the statute—or, I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication. There is not, in my opinion, one kind of Crown exemption from the statute of Elizabeth, and another kind of Crown exemption from the Income Tax Acts. In other words, it appears to me that the existence of the same kind and degree of interest, on the part of the Crown, which is deemed in law sufficient to protect an occupier from liability to the poor rate, must also be held sufficient to shield the owner of the bare legal estate against any demand for payment of income tax. The judgment of a Court of law to the effect that certain public purposes are such as are required and created by the Government of the country, and must therefore be deemed part of the use and service of the Crown, is a decision resting upon grounds altogether outside and independent of the provisions of the Act of Elizabeth, and, so far as I know, of any other Taxing Act to be found in the statute-book. I therefore think that the cases in which it has been decided that the actual occupiers of assize courts and police stations are exempt from poor rate, as being within the privilege of the Crown, are decisions of equal authority in a question as to exemption from income tax. I cannot conceive that what must be held to be a proper Government use, for the purpose of determining the incidence of the poor rate, or any other local rate, should be held to be a use unconnected with the Government of the country in determining the incidence of the income tax.

Your Lordships were referred in the course of the argument to the case of *Clerk* v. *The Dumfries Commissioners of Supply* (1), which was decided by the First Division of the Court of Session in the year 1880. After careful examination, I am satisfied that the circumstances of that case raise the precise question which your Lordships have now to decide; and, consequently, that, in the event of your Lordships holding the decision of the Lords of the First Division to be right, there would remain no alternative in the present case except to give judgment for the appellant. For the reasons which I have already endeavoured to indicate, I am of opinion that *Clerk* v. *The Dumfries Commissioners* (1) was not rightly decided; and I have less hesitation in differing from the learned Judges of the Court of Session, seeing that their judgment appears to rest mainly on the assumption that the cases establishing immunity from poor rates have no application to a question under the Income Tax Acts, and that an owner who could plead the privilege of the Crown against payment of a local assessment cannot on the same ground resist payment of an imperial tax. It would have been more satisfactory had their Lordships explained the reasons upon which that assumption was made. The Lord President observed that "it is impossible to say that, in charging income tax against this property, any charge is made against the Queen or the Queen's Government." That is unquestionably true; but it is equally impossible to say that, if the owners and occupiers of county police stations were held to be liable to assessment for the poor, the rate would be a charge against Her Majesty or her Government.

I do not think it necessary to notice in detail the alternative argument, addressed to the House by counsel for the respondent, founded on the circumstance that, under the Income Tax Acts, property is the subject of assessment, the owner being ultimately liable, whilst the tax is made directly payable by the occupier. The argu-

ment was carried the length of maintaining that the owner could not be made liable if the occupier was not a rateable person; but I am by no means satisfied that if A were to let his property for Government use to the head of one of the great departments of the State, for a substantial rent, he would escape from payment of the income tax because his tenant was exempt from all taxation. I desire to add that I do not concur in many of the observations that were made upon this part of the case by some of the learned Judges in the Courts below.

In the event of judgment going against him upon the main questions raised by his appeal, the appellant maintained that he was entitled to have a finding from your Lordships to the effect that part of the premises in question have an assessable value, seeing that the county hall and certain apartments connected with it are only temporarily required for assize purposes, and are capable of being let at other times. I am certainly not prepared to hold that the duty laid upon county authorities of providing suitable accommodation for Her Majesty's Courts of Assize carries with it an implied statutory prohibition against letting for profit, at seasons when such accommodation is not required for Government purposes. Whether any part of the premises in question could be so let by the respondents, consistently with fair and reasonable administration of their public trust, is a question to which the case before us affords no materials for an answer. Besides, the question is not one of law for the consideration of this House, but one of fact, which must be determined by the Income Tax Commissioners.

I therefore am of opinion with your Lordships that the judgment of the Court of Appeal ought to be affirmed, with costs.

Lord Bramwell.—I am of the same opinion, and, after what has been said, I need add but little. When the Courts had first to consider the question of liability to the poor rate of property, its owners and occupiers being such as those under consideration, I suppose it seemed unreasonable to them that such property should pay rates, there being no profitable occupation for private purposes, and they found or made a reason for its exemption. Whether they were right may be doubtful. The poor rate is local. Whatever exempts part of the property in a rated locality adds to the burden on the rest; and there is this additional hardship, that the exempted part may increase the burden itself by adding to the numbers chargeable on the rate. Moreover, the reasoning on which the exemption was founded may be doubtful. But it is the law—the law as confirmed in this House by the reasoning in *The Mersey Docks Case* (2).

I agree with my noble and learned friend (Lord Watson) that "the cases in which it has been decided that the actual occupiers of assize courts and police stations are exempt from poor rate, as being within the privilege of the Crown, are decisions of equal authority in a question as to exemption from income tax. I cannot conceive that what must be held to be a proper Government use for the purpose of determining the incidence of the poor rate or any other local rate should be held to be a use unconnected with the government of the country in determining the incidence of the income tax." This is my *ratio decidendi*. Indeed, I think the case is one *a fortiori*. For, as I have said, there is some hardship in exempting any property from a local rate, there is none in exempting from a general tax a class of property everywhere within the range of that tax. The payers and receivers of poor rate are not the same. If the Crown paid income tax it would be at once payer and receiver. And, indeed, in one view the question is unimportant: for if this kind of property pays everywhere, a less rate of income tax will be necessary, and a greater local rate everywhere: whereas by our decision more income tax may be required, and less local rate. And this is what many people think desirable.

Like my noble friend opposite, I am by no means satisfied that if this property was leasehold the owner of the rent paid for it would not be liable to income tax.

I also desire to add that I see no reason why this property should not be used for purposes other than but not inconsistent

with its primary objects. The doctrine of *ultra vires* has done mischief enough; I am not prepared to extend it.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors—W. H. Melvill, Solicitor of Inland Revenue; Newman, Stretton & Hilliard, agents for J. T. Morland, Abingdon, for respondents.

[IN THE COURT OF APPEAL.]

1884. March 17.

BELT *v.* LAWES.*

Practice—Motion for New Trial—Excessive Damages—Power of Court to reduce Damages, with consent of Plaintiff.

If the only ground upon which the verdict of a jury can be impeached is that the damages are excessive, the Court has power, with the consent of the plaintiff alone, to reduce the damages to such an amount as would not be excessive if it had been given by the jury.

This was an action of libel. At the trial before Huddleston, B., the jury found a verdict for the plaintiff for 5,000*l.* damages. The defendant moved the Divisional Court for a new trial, upon the ground that the verdict was against the weight of evidence, and that the damages were excessive. The Divisional Court differed in opinion—Lord Coleridge, C.J., being of opinion that the verdict was wrong; Manisty, J., that it was right, and Denman, J., that the damages ought to be reduced to 500*l.* The plaintiff consented that the damages should be reduced to that amount; but the defendant refused, contending that more than nominal damages would be against the weight of evidence. In the result the rule was discharged.

The defendant appealed.

C. Russell, Q.C. (with him *Webster, Q.C.*, and *Lewis Coward*), for the defendant, contended that the Court had no power to reduce the damages, except with the consent of both parties—*Price* v. *Severn* (1), *Leeson* v. *Smith* (2), *Hilton* v. *Fowler* (3) and *Phillips* v. *The London and South Western Railway Company* (4) were referred to.

Sir H. Giffard, Q.C., and *Pollard*, for the plaintiff.

BRETT, M.R.—The first question in this case is whether the judgment of the majority of the Divisional Court can in law stand, if the verdict cannot be otherwise impeached, but the plaintiff consents that the amount shall be reduced. In my opinion it can stand. Where the complaint is only that the damages are excessive, although there ought to be substantial damages, the Divisional Court can grant or refuse a new trial without the consent of the defendant, if the plaintiff consents that the verdict should be reduced to an amount which the Court does not think would be excessive if it had been given by the jury. It was said that that rule could not be right, because there the Court would have come to the conclusion that the verdict was wrong, and the inevitable result of that is that there must be a new trial. But the Court, when asked to grant a new trial, more particularly upon the ground that the damages are excessive, is asked to exercise a discretion. Where the jury have given the larger damages, the Court, if it does what has been suggested, does not give damages which the jury had not given, but only says that if the jury had given a part of the damages which they have assessed, the Court would not have been dissatisfied. But more than that, inasmuch as the power of the Court is a discretionary power, it may be exercised by the Court in any way that may not be unjust. It was argued by Mr. Russell that, if the Court could reduce the damages without the consent of both parties, the Court could also increase them without any consent: which, it was said, would be absurd, because the Court would then be giving

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

(1) 7 Bing. 316, 320; 9 Law J. Rep. C.P. 99.
(2) 4 Nev. & M. 304, 306.
(3) 5 Dowl. 312.
(4) 49 Law J. Rep. Q.B. 233; Law Rep. 5 Q.B. D. 78.

damages which a jury had not given. Supposing that were so, it does not seem to me that the difficulty in the way of the Court in the one case would be an insuperable difficulty in the other. But I am by no means prepared to say that the Court might not, under certain circumstances, refuse to grant a new trial if a defendant would consent that the verdict should stand for larger damages than the jury had given. Supposing that a plaintiff moved for a new trial, upon the ground that the damages for which he has obtained a verdict are too small, I am not prepared to say that the Court might not, under those circumstances, say, in favour of the defendant really, that if he would consent to the damages being increased the Court would refuse the plaintiff a new trial. But, however that may be, and reserving to myself the decision on such a case when it may arise, I have not the least doubt that, where a jury have given damages which are challenged upon the ground that they are extravagantly large, the Court may say, if the jury instead of having given 5,000*l.* had given 500*l.*, that amount would not have been considered by the Court to be excessive, and therefore, if the plaintiff would consent to the verdict standing for that amount, a new trial would not be granted to the defendant upon the ground for which he had asked for it. The defendant, if the plaintiff consented to this, would, in reality, have no grievance. I can see nothing contrary to that in principle, and it has been the invariable practice of the Courts for years to do so, and has never been before challenged. I cannot accept the validity of the argument that, inasmuch as this matter has never before this case been disputed, it is contrary to principle, because I apprehend that it is the law; and in this respect the judgment of the Divisional Court, if nothing else could be said against it, would have to be supported, and this verdict would have to stand for the plaintiff for 500*l.* But the judgment is challenged by both parties—by the defendant, who alleges that a verdict for more than nominal damages is in this case against the weight of evidence; and by the plaintiff, because he alleges that the original damages were not excessive. The ultimate question, therefore, will be, whether the original verdict can, according to rule, be impeached (5).

BAGGALLAY, L.J.—As regards the preliminary point raised in this case, I entirely agree with what has been said by the Master of the Rolls. I am of opinion that it is within the power of the Court, with the assent of the plaintiff, to reduce the amount of damages if the Court think that the damages, although the verdict was otherwise proper, had been assessed at too high an amount (5).

LINDLEY, L.J.—The first question raised in this case was whether the Divisional Court had power to discharge the rule for a new trial, if the plaintiff would consent to reduce the damages awarded to him by the jury. I am of opinion that the Court had power to do this, and I believe that the power has constantly been exercised and never questioned. As soon as the Court has decided that a verdict for a plaintiff for more than nominal damages is right, the amount to which the damages given by a jury are to be reduced is a matter which concerns the plaintiff alone; and if he is content to accept a sum suggested by the Court, it appears to me that the defendant has no ground of complaint. The authorities cited to shew that the defendant's consent is also necessary do not appear to me to be in point. In fixing the damages, instead of directing a new trial, the Court does not usurp the province of a jury so much as when it sets aside a verdict and directs a new trial, which the Court always has power to do upon proper grounds (5).

Solicitors—C. O. Humphreys & Sons, for plaintiff; Lewis & Lewis, for defendant.

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(5) His Lordship then discussed the questions whether the verdict was against the weight of evidence, and whether the damages were excessive, coming to a conclusion in favour of the plaintiff on both points.

1884. March 8. TODD v. ROBINSON.

Penal Action—Public Health Act, 1875, *s.* 193—*Penalty on Officer interested in Local Board Contract — Remission of Penalty by Crown—22 Vict. c.* 32.

The Act 22 Vict. c. 32, which makes it lawful for the Crown to remit any sum of money which under any Act may be imposed as a penalty or forfeiture on a convicted offender, does not apply to a case where judgment for the penalty mentioned in section 193 of the Public Health Act, 1875, *is obtained in an action against a clerk to a local board for having been interested in a contract made with the local authority whose officer he is.*

This was an appeal from an order of the Judge at chambers restraining execution on a judgment obtained by the plaintiff in the action for 50*l.* and costs. The action was brought to recover a penalty, under section 193 of the Public Health Act, 1875, against the clerk to a local board, on the ground of his having been a shareholder in a certain company interested in a contract made with the local authority whose officer he was for the purposes of the Act. On the judgment for the full penalty of 50*l.* having been obtained, and before execution issued, the defendant applied to the Treasury to advise the Crown to remit the penalty in accordance with the power contained in 22 Vict. c. 32. That Act says, "It shall be lawful for Her Majesty to remit in whole or in part any sum of money which, under any Act now in force or hereafter to be passed, may be imposed as a penalty or forfeiture on a convicted offender, although such money may be in whole or in part payable to some party other than the Crown, and to extend the royal mercy to any person who may be imprisoned for non-payment of any sum of money so imposed, although the same may be in whole or in part payable to some party other than the Crown." Thereupon the Commissioners of the Treasury acceded to the defendant's request and remitted the penalty. He then asked the Judge at chambers for the above-mentioned restraining order, against which the plaintiff appealed to the Divisional Court.

J. L. Walton, for the plaintiff.—This penalty was one recoverable by action of debt; it was not a criminal matter at all, and therefore did not come within the purview of the Act 22 Vict. c. 32. There was therefore no jurisdiction in the Treasury to remit this penalty, and the plaintiff ought to have execution of his judgment.

T. W. Chitty, for the defendant.—This was really a conviction: the defendant's act was an illegal one, for which there was a fixed penalty by way of punishment. *Cuming* v. *Sibly* (1) shews that judgment under a penal statute on an action of debt for a sum certain is a conviction; and, that being so, the statute 22 Vict. c. 32 is satisfied, for it is not limited to a criminal charge strictly so called. See also *Earl Spencer* v. *Swannell* (2).

DAY, J.—I am of opinion that this appeal should be allowed, on the short ground that the case did not come within the scope of the Act 22 Vict. c 32, under which the Treasury assumed power to remit the penalty. That Act applies to criminal offences for which a penalty or forfeiture is imposed for punishment. This was an action to recover a sum of money in the nature of a debt, and is not within either the letter or spirit of the Act.

SMITH, J. (after stating the facts as above, and reading the section)—It was contended that, although the plaintiff was right in his action, yet the Treasury had the power of excusing the defendant from payment of the amount of the judgment. The question is, Can the defendant be called "a convicted offender"? I think not. He does not therefore come within the Act.

Appeal allowed.

Solicitors—Brownlow & Howe, agents for E. Clark, Newcastle-on-Tyne, for plaintiff; J. E. & H. Scott, agents for W. S. Daglish, Newcastle-on-Tyne, for defendant.

(1) 4 Burr. 2489.
(2) 3 Mee. & W. 154; 7 Law J. Rep. Exch. 73.

[IN THE COURT OF APPEAL.]

1884. March 13. THE SEA INSURANCE COMPANY (LIMITED) *v.* HADDEN AND ANOTHER.*

Marine Insurance—Separate Policies on Ship and Freight—Collision—Abandonment—Payment for Total Loss on Ship—Right of Underwriters on Ship to Damages recovered by Assured for Unearned Freight.

The defendants effected a policy of insurance on their ship for 1,000*l. with the plaintiffs; but insured the freight with other underwriters. The ship, while proceeding to her port of loading under a charter-party, was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who settled with them as for a total loss. The defendants afterwards recovered in the Admiralty Division against the owner of the other ship damages in respect of the loss of the ship and also of the freight which had not been earned:*— Held, *that the plaintiffs were not entitled to recover the damages recovered in respect of the loss of freight, such damages being in the nature of salvage on freight: for freight which has not been earned is not an incident of the ownership of the ship, and does not therefore pass to the underwriters, who have paid as for a total loss on the ship.*

Appeal from a judgment of Day, J.

In March, 1881, the defendants, who were the owners of the ship *Queen of the East*, entered into a charter-party, whereby they agreed with the charterers that their ship, which was then at Liverpool, should, with all possible despatch, proceed direct to Penarth Dock, Cardiff, and there load a full and complete cargo of coals, and then proceed to Bahia. The charter-party contained the usual clauses as to excepted perils.

After the making of the charter-party the defendants effected a policy of insurance on their ship for 1,000*l.*, which was less than her value, whereby the plaintiffs became the insurers thereof, lost or not lost, at and from Liverpool (in tow) to Cardiff, while there, and thence to Bahia, and for thirty days in port after arrival, against the usual risks.

The defendants also effected a policy of insurance on the freight with persons other than the plaintiffs.

In April, 1881, the defendants' ship, in the course of her voyage from Liverpool to Cardiff, in ballast, and in tow of a tug, was run into by the steamship *Cassandra*, and became a constructive total loss, and the freight in course of being earned was lost.

The defendants gave notice of abandonment to the plaintiffs and other underwriters, and claimed as for a total loss. The plaintiffs accepted the abandonment, and settled with the defendants, paying them the sum of 1,000*l.*

Subsequently proceedings were taken in the Admiralty Division by the owners of the *Cassandra* against the defendants, who counter-claimed for the damages caused to them by the collision. The owners of the *Cassandra* admitted their liability, subject to a reference to the Registrar, assisted by merchants, to assess the amount.

The defendants recovered from the owners of the *Cassandra* certain sums as damages, including an item of 1,055*l.* 11*s.* 4*d.*, in respect of the loss of freight which was in course of being earned under the charter-party; and the net sum received in respect of that item, after deducting certain expenses, was 1,001*l.* 8*s.* 11*d.*

Under these circumstances, the plaintiffs claimed payment of 250*l.* 7*s.* 3*d.*, one-fourth of the sum paid in respect of loss of freight, being the proportion which the amount insured by the policy bore to the value of the defendants' ship.

At the trial at Liverpool, before Day, J., the above facts were admitted, and judgment was given for the defendants.

The plaintiffs appealed.

Cohen, Q.C., and *Gorell Barnes* (with them *C. Russell, Q.C.*), for the plaintiffs.—The question is whether the plaintiffs are entitled to recover the amount, or a proportionate part thereof, which has been recovered by the defendants in respect of unearned freight. It may be that the underwriters, if so entitled, may recover more than they have paid; but that is immaterial. The underwriters who pay upon either an actual or a constructive total loss are entitled to anything that remains of the vessel, and to anything which would

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

have otherwise accrued to the owner of the ship by reason of his ownership; so also if the ship had been wrecked, and the underwriters, having got the ship up, had procured the wrong-doer to repair her, she would, when so repaired, still belong to the underwriters—*The North of England Insurance Association* v. *Armstrong* (1). Where the underwriters have paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to them as from the time of the disaster; the right to receive payment of freight accruing due is one of those rights which is incident to the property in the ship, and which passes with the ship—*Simpson* v. *Thomson* (2). As between the insurer and the assured, the insurer is entitled to be placed in the position of the assured, and is therefore entitled to the advantage of every right of the assured, whether that right, *inter alia*, consists in contracts fulfilled or unfulfilled—*Castellain* v. *Preston* (3). The defendants recovered the freight in the Admiralty Division because they might have earned it by means of the ship and the charter-party. The money is recovered in respect of the loss of an advantage which might have been derived by the owner of the ship under the charter-party; freight in course of being earned is a benefit or advantage incident to the ship, and it becomes the property of the underwriters who pay as for a total loss—*Stewart* v. *The Greenock Marine Insurance Company* (4), considered in *Rankin* v. *Potter* (5). *Morrison* v. *Parsons* (6), *Case* v. *Davidson* (7), *Darrell* v. *Tibbits* (8), *Randal* v. *Cockran* (9) and *Arnould on Marine Insurance* (10) were also referred to.

C. Crompton, Q.C., and *W. R. Kennedy*, for the defendants.—The sole question is whether freight is incident to the ship or incident to the contract of affreightment. There is no authority to the effect that unearned freight is incident to the ship. The underwriters are undoubtedly entitled to the damages which have been recovered in respect of the loss of the ship, but the damages in respect of the freight are given because the shipowners have not been able to carry out the contract of carriage; the plaintiffs are not entitled to recover those damages from the defendants—*Hickie* v. *Rodocanachi* (11), *Keith* v. *Burrows* (12) and *Simpson* v. *Thomson* (2) were also cited.

Cohen, Q.C., in reply.—If the assured elects to claim from the underwriters as for a total loss, the usual legal consequences follow, and the underwriters, whether they gain or lose, are entitled to recover from the assured whatever he may have received as owner of the ship.

BRETT, M.R.—In this case the defendants insured their ship, and also the freight, but with different underwriters. The ship, which was under charter, was so seriously injured by collision with another ship, that she was abandoned to the underwriters upon the ship, to whom therefore the property in the ship passed from the date of the collision. The defendants then sued the owners of the other ship in the Admiralty Division, because the damage done by the collision gave them a maritime lien on the other ship, for the injury done to their ship by the negligence of the servants of the owners of the other ship. The defendants had not suffered a total loss, for the ship had not sunk; but whether their ship was sunk or not, there was another loss which they had suffered by the negligence of the other ship, because they had a contract of charter-party, and by the negligence of the servants of the owner of the other ship they were deprived of the power of making any profit. The underwriters on the ship, the plaintiffs, have sued the defendants to recover from them what they had obtained by way of salvage in consequence of the loss of their ship;

(1) 39 Law J. Rep. Q.B. 81; Law Rep. 5 Q.B. 244, 249, 251.
(2) Law Rep. 3 App. Cas. 279, 292 (Scotch).
(3) 52 Law J. Rep. Q.B. 366; Law Rep. 11 Q.B. D. 377, 388, 395.
(4) 2 H.L. Cas. 159; 1 Macq. H.L. 328.
(5) 42 Law J. Rep. C.P. 169; Law Rep. 6 E. & I. App. 83, 145.
(6) 2 Taunt. 407.
(7) 5 M. & S. 79, 87; in error, 2 B. & B. 379.
(8) 50 Law J. Rep. Q.B. 33; Law Rep. 5 Q.B. D. 560, 563.
(9) 1 Ves. 98.
(10) Vol. ii. p. 931 (5th ed.)
(11) 4 Hurl. & N. 455; 28 Law J. Rep. Exch. 273.
(12) 46 Law J. Rep. C.P. 801; Law Rep. 2 App. Cas. 636.

and, having paid to the defendants the whole value of the ship, they are entitled to recover whatever was paid to the shipowners by way of salvage on the ship. But all that the underwriters on the ship are entitled to recover is the salvage which has come to the hands of the shipowners in respect of the loss of their ship. If that be so, the question is, is the contract of affreightment a salvage upon the loss of the ship? The underwriters, as soon as they have paid for a total loss, would be entitled to the contract of affreightment, if that contract is a salvage on the loss of the ship, and would be entitled to sue upon that contract. There is, however, no authority to that effect, and it seems to me that the contract does not pass to the underwriters. If, therefore, this comes within the doctrine that the assured is obliged to hand over all that comes to him by way of salvage in respect of the loss of the ship, the contract of affreightment does not pass by way of salvage.

It was said that the rights under the contract pass to the assured, because they are incident to the ownership of the ship. The contract of affreightment, the subject-matter of which is the carriage of goods, is no part of the ship; nor is it an incident of ownership, in the sense that it is an incident under all circumstances. It is a mere accident as regards the ship, and is an independent contract, of which the ship is not the subject-matter.

The absence of the contract of affreightment does not diminish the value of the ship; nor does its existence, as was pointed out by Baron Bramwell in *Hickie* v. *Rodocanachi* (11), increase the value of the ship. Being therefore a contract independent of the ship, although it can only be performed by means of the ship, it does not come within the definition of those contracts which are said to be incident to, and which therefore pass with, the ownership of the ship. The subject-matter of such contracts is the ship—as, for instance, a contract to repair the ship on her return home from the voyage, or to paint her, upon the terms that payment is to be made the moment the contract is made: in which cases the right to have the ship repaired or painted when the ship returned home would I should have thought, pass with the ownership of the ship. The only person who has contracted to paint or repair the ship has merely to perform his contract, the subject-matter of which is the ship. But in this case the ship is not the subject-matter of the contract of affreightment.

The case of *Hickie* v. *Rodocanachi* (11) is an authority on the question whether this contract is an incident of ownership of the ship. Mr. Baron Bramwell, in giving the judgment of the Court, said that Mr. Blackburn had argued that "a contract of insurance was one of indemnity; that an insurer was in the nature of a surety, and entitled to the benefit of all the securities the insured possessed. But in truth this argument tells against him. The common insurance on a ship is in no way concerned with the freight in course of being earned. It is an insurance on the absolute value, not on that and the vessel's adventitious advantages. If any question of the value of the ship arose, the insured could not include the freight as an item in the calculation, any more than he could the prospect of winning a wager which he had made that she would arrive at her port of destination. It is the goods, not the ship, which are increased in value by the arrival of the ship, or rather their arrival; and if they arrive, the freight is earned. But the matter needs no argument; it is enough to refer to the practice of separate insurance on freight." That is to say, that by the practice of merchants which is acknowledged by the law, it is shewn, from the undisputed fact that there are two separate insurances, that the ship and freight are two separate things. Then his Lordship says, "If, then, the loss of freight is no part of the loss in the loss of the ship, consequently the insurer of ship ought to have no benefit from the earning of freight unless he helps to earn it." I will deal with that part presently. Then, at the end of the judgment, it is said, "that the underwriters may be indeed entitled to advantages attached to the ship, but not to those arising from contracts, the fulfilment of which can be, and is, detached from the ship." The contract of affreightment is one which can be, and often is, detached from the owner of the ship, who, under certain circumstances, may fulfil it, or may

make a new contract which is to be fulfilled by means of another ship. That seems to me to be a strong authority to shew that the freight to be earned by the contract of carriage and the ship herself are not so attached together that the one can be said to be incident to the other within the meaning of the rules which have been laid down. A contract of affreightment is not incident to the ownership of the ship; it is an independent contract, which the owner of a ship may or may not make. What was pointed out by Mr. Kennedy seems to me to be very strong to shew that this contract and the ship are separate. If there be an insurance on the ship to one underwriter, and an insurance of the freight to another, whatever is a salvage in respect of the ship if she is lost, or if the underwriter pays as for a total loss, goes to the underwriter on the ship. But whatever is a salvage in respect of the freight for which the underwriter on freight has to pay as for a total loss ought to go to him. The damages which have been recovered here in respect of the value of the ship, being a salvage in respect of the loss of the ship, go to the underwriters on the ship. The other salvage is in respect of the loss of freight, which ought to go to the underwriters on freight, because the freight and ship are not so joined together as that the loss of freight is a salvage on the loss of the ship. The underwriters on ship cannot recover this freight; the contract of insurance does not pass to the underwriters on ship who have paid the total loss on the ship. It cannot be contended on behalf of the underwriters on ship that they could, either in their own name or in the name of the assured of freight, sue the owner of freight for the loss. It is clear that the recovery of damages in respect of the loss of freight, which is a separate loss from the loss of the ship, is not a salvage which is in respect of the loss of the ship, which ought to go to the shipowner. It was said that where the ownership of a ship is transferred, either by sale or by abandonment, to underwriters after the commencement of the voyage, and that where goods which have been shipped on board originally are carried to their destination by the underwriters, the underwriters, or the vendee of the ship, can sue the owner of the goods for freight. That, however, comes under a totally different head of the law, and it is clear that the owner of the goods in such a case cannot be allowed to have the benefit of the carriage of the goods without payment. It is not the person with whom the contract of carriage was made who is entitled to be paid, for he has not fulfilled the contract; but the person who is the owner of the ship at the moment when the payment becomes due—that is when the goods are delivered. That is a somewhat stretched principle of law, and one based upon a custom of merchants, under which it is said that because payment must be made to some one, and it cannot be made by the owner of the goods to the person with whom the contract of carriage was made, it must be made to the person to whom the payment will become due at the moment when it becomes due, namely, at the time of delivery. The payment does not seem to me to be a payment under the original contract of affreightment: but it is a payment for work and labour done; and where there has been an original contract of affreightment, that contract is taken invariably as the measure of the value of the work and labour. I agree with the opinion expressed by Mr. Baron Martin in *Hickie* v. *Rodocanachi* (11) as to that, which comes under a totally different head of the law, and does not alter the rights which arise under this contract of insurance. The judgment of Mr. Justice Day was therefore right, and ought to be affirmed.

BAGGALLAY, L.J.—I agree with the conclusion at which the Master of the Rolls has arrived, and also with the reasons which he has given, but I propose to add a few words with reference to the argument which has been pressed upon us by Mr. Kennedy. As far as regards the amount apportioned in respect of the loss of the ship, the defendants have fully recognised the right of the insurers of the ship to receive their proportion, and have also recognised the right of the insurers of freight to receive the other proportion which they have paid. In the present action the plaintiffs claim that the defen-

dants shall pay it over a second time, upon the ground that it had not been paid to the proper persons in the first instance. Supposing, as was put by Mr. Kennedy, that so much of the amount as had been assessed by the Registrar and merchants had not been paid over to the insurers on freight, it might be considered that there were two parties claiming, each by virtue of their having paid sums of money in respect of their insurance. But it would be contrary to the principles laid down in *Castellain* v. *Preston* (3) to hold that the insurers on freight are to be deprived of their right to be recouped the sums of money to which, under the ordinary principles of insurance law, they would be entitled. None of the cases cited carry the principle to the extent which has been contended for on behalf of the appellants. In *Stewart* v. *The Greenock Marine Insurance Company* (4), the freight had been earned before abandonment, and it is distinctly stated that the vessel received a certain amount of damage from collision with an iceberg, and afterwards, when proceeding up the river at Liverpool into dock, met with the accident which led to her being abandoned—but the abandonment did not take place until after the cargo had been discharged. The case of *Simpson* v. *Thomson* (2), which was much relied upon by the appellants, turned upon the circumstances of the case, and certain *dicta* only could be relied upon, because the actual decision was adverse to the claim of the appellants.

LINDLEY, L.J.—I am of the same opinion. It lies upon the plaintiffs here to shew on what principle they are entitled to the sum of money which was assessed in the Admiralty proceedings by way of compensation for the loss of freight. The matter has been put in two ways. Looking at it first of all apart from the question of the ownership of the ship, and simply as a question of contract, it is obvious that an insurance on ship and an insurance on freight are two different things, and that the ship does not include freight at all. An insurer on ship is not liable for the loss of freight; but he is entitled to every benefit to which the assured is entitled in respect of the subject-matter of the contract of insurance, namely, the ship, as distinguished from the freight. Looking at the question, therefore, apart from ownership, the argument of Mr. Kennedy is unanswerable. Then it was said that, having regard to the abandonment, the insurer on ship has become the owner of the ship, and, as such owner, is entitled, not only to the whole of the freight, but also to everything which the owner of the ship may recover by way of compensation for freight which has not been earned. As regards that, I agree with that which the Master of the Rolls has said, and will only add a further observation. The title of the underwriter on ship to become the owner of the ship accrues, if at all, when the loss occurs. But at that time the freight is already subject to the rights of other persons with whom it has been insured. The argument is, that the underwriter on ship, because he is entitled to the ship, is also entitled to the freight, throwing out of sight all the contracts to which the freight has already been subject. It appears to me that the owner of a ship is, in that point of view, claiming more than he can establish a right to: for, on the one hand, he is asking for the freight, and on the other, he is repudiating the rights of those who have already acquired a right to the freight by reason of the policy on the freight as distinguished from the ship. In neither case can the underwriter on ship acquire the money which has been awarded to the owner of the ship in respect of the freight as distinguished from the ship.

Appeal dismissed.

Solicitors—Field, Roscoe & Co., agents for Bateson, Bright & Warr, Liverpool, for plaintiffs; Gregory, Rowcliffe & Co., agents for Stone, Fletcher & Hull, Liverpool, for defendants.

[IN THE HOUSE OF LORDS.]

1884.
Feb. 28.
March 3.

LOVE AND ANOTHER *v.* BELL AND ANOTHER.

Mines—Support to Surface—Enclosure Act—Reservation of Mining Rights to Lord of Manor—Compensation for Damage.

By an Enclosure Act passed in 1771, *allotments of common land were made to tenants of a manor entitled to rights of common, to be held on the same tenure as the tenements in respect of which they were allotted. The Act provided that nothing therein contained was to lessen, prejudice or defeat the right and interest of the lords of the manor and their successors of in or to the royalties incident or belonging to the manor, but that they and all persons claiming under them should for ever thereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting way-leave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owners of the manor belonging (other than the right of common) in as full, ample and beneficial manner, to all intents and purposes, as they could have held and enjoyed them in case the Act had not been made.*

The Act further provided that if the lords of the manor, or any one claiming under them, should work any mines lying under any of the allotments so to be made, or lay, make or use any ways in, through, over or along any part of the allotments, then the person so working should make satisfaction for the damage and spoil of the ground so occasioned to the person in possession of the ground at the time of the damage, such satisfaction not to exceed the sum of 5*l. yearly during the time of such working for every acre of ground so damaged or spoiled.*

There were under the manor coal mines, portions of which had for two centuries been worked by the lords or their lessees without leaving any support for the surface. There were no special customs as to working mines under the common lands.

The appellants, lessees from the lords of the mines under a freehold allotment, by their working let down the surface of the allotment, and damaged a house which had been erected thereon upwards of twenty years before. The surface would have subsided if there had been no house on it:—

Held, *that the reservation to the lords did not confer any right to work the mines so as to let down the surface, and that no such right was implied in the compensation clause, which was to be regarded as limited to damage caused by workings on the surface: consequently that the respondents (the owner and occupier of the allotment) were entitled to support from the mines, and to full damages for the injury sustained by the subsidence.*

This was an appeal from a decision of the Court of Appeal, which affirmed one of the Queen's Bench Division. The case is reported 52 Law J. Rep. Q.B. 290; Law Rep. 10 Q.B. D. 547.

The facts are fully stated in the report of the proceedings in the Court below, and sufficiently appear in the head-note to the present report and in the judgments.

The Solicitor-General (*Sir F. Herschell*) and *F. Meadows White, Q.C.* (*J. Edge* with them), for the appellants.—There must be some limitation to the right to erect buildings and to obtain compensation for injury thereto, or the whole ground may be covered and no approach left to the mine. The rights of allottees were subject to the lord's exercising mining and other rights as fully as before. Before the enclosure he could have let down the surface without being liable to pay compensation. The case is substantially the same as *The Duke of Buccleugh* v. *Wakefield* (1). The decision in *Blackett* v. *Bradley* (2) followed that in *Hilton* v. *Lord Granville* (3), which was held to have been wrongly decided in *Gill* v. *Dickinson* (4).

The opinion expressed by Lindley, L.J., that *Dalton* v. *Angus* (5) shews that the appellants would have had no right to let down a house which had stood for twenty years, even if they had the right to let

(1) 39 Law J. Rep. Chanc. 441; Law Rep. 4 H.L. 377.
(2) 1 B. & S. 940; 31 Law J. Rep. Q.B. 65.
(3) 5 Q.B. Rep. 701; 13 Law J. Rep. Q.B. 193.
(4) 49 Law J. Rep. Q.B. 262; Law Rep. 5 Q.B. D. 159.
(5) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.

down the surface in its natural state, cannot be supported. See Lord Wensleydale's judgment in *Rowbotham* v. *Wilson* (6).

[Their Lordships intimated that they considered the law settled on this point by *Rowbotham* v. *Wilson* (6).]

The instrument creating the rights was one by which the lord parted with his freehold; he himself obtained no allotment, as lord he only got the mining rights. The words in the compensation clause are just as applicable to injury by subsidence as to injury by surface working.

[THE LORD CHANCELLOR referred to *Roberts* v. *Haines* (7).]

That is not an authority, as it proceeded upon concessions of counsel as to this point. Besides, there were words pointing to surface workings. Here there are none.

They also referred to *Aspden* v. *Seddon* (8), *Dixon* v. *White* (9), *Harris* v. *Ryding* (10) and *Smart* v. *Morton* (11).

Russell, Q.C., and *Ridley*, for the respondents, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—The authorities, which are numerous, from *Harris* v. *Ryding* (10) and *Dugdale* v. *Robertson* (12), down to the recent case of *Davis* v. *Treharne* (13), which was decided in this House in 1881, have, I think, fully established the general law applicable to the case of two owners, the one of the upper strata—the surface of the ground—the other of the lower strata, containing minerals which are to be worked; and perhaps the most convenient way of putting the matter will be to read a few words from the opinion given by Lord Blackburn in the case which I last mentioned—namely, the case of *Davis* v. *Treharne* (13). His Lordship says:—"I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn—the burden lying on those who wish to shew it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and if there are mineral workings under the surface, to have a proper support left for it by pillars"—whoever claims against that has the burden of proof thrown upon him. And that is what I think is meant by some passages which I rather think occurred in the judgments of the learned Judges in the Court of Appeal in this case, where it was said that it must be clearly made out. That I understand only to mean that it must be sufficiently made out to satisfy that burden of proof.

In the same case, *Davis* v. *Treharne* (13), Lord Blackburn deals with the question which there arose, and on this principle: that when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so by shewing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage; it is, in my judgment, in accordance with what is to be found in the other authorities.

Starting with these principles we have to consider this particular case. It is, I may say, an ordinary case of enclosure of open or common lands, where the lord of the manor has certain rights—the right to the soil, and of course the right to the minerals below it—and the commoners have certain surface rights. The recital is, that by the enclosure this tract of waste ground, which then yielded little profit,

(6) 6 E. & B. 593; 8 ibid. 123; 8 H.L. Cas. 348; 25 Law J. Rep. Q.B. 362; 30 ibid. 49.

(7) 6 E. & B. 643; 7 ibid. 625; 25 Law J. Rep. Q.B. 353; 27 ibid. Exch. 49.

(8) 44 Law J. Rep. Chanc. 359; Law Rep. 10 Chanc. 394.

(9) Law Rep. 8 App. Cas. 833.

(10) 5 Mee. & W. 60; 8 Law J. Rep. Exch. 181.

(11) 5 E. & B. 30; 24 Law J. Rep. Q.B. 260.

(12) 3 Kay & J. 695.

(13) 50 Law J. Rep. C.P. 665; Law Rep. 6 App. Cas. 460.

might become "capable of considerable improvement." I shall have occasion to refer to that afterwards in connection with an argument which was suggested, that no improvement except by using the enclosed ground for agricultural purposes could be supposed to have been in contemplation. It goes on to allot to the lord in severalty certain plots and parcels of ground. Whether it be more or less that, upon the enclosure, is allotted to the lord can make no difference; it is equally a case of mutual considerations, resulting in the apportionment of land, which the parties may be taken to have agreed to, or to have had determined for them by the authority which made the award. If one is to draw any inference from the fact that the greatest part of the land seems to have been allotted to the commoners, and a comparatively small part (if such is the fact) to the lords, the dean and chapter, the inference rather would be that the rights of the commoners in this case were very substantial, and that the rights of the dean and chapter, so far as the surface was concerned at all events, were small in comparison with them. However, that is not important. Then there follows the allotment of the residue to the commoners in respect of the houses, some freehold, some leasehold, to which the right of common had been appurtenant or appendant, and they are to hold the allotted lands upon the same tenure on which they hold those houses. The particular allotments in question, being in respect of freehold houses, are freehold allotments, and we have to deal therefore with a freeholder having the ordinary rights of a freeholder to his allotment, except in so far as there is something in this Act to make them less than the ordinary rights.

The question whether there is or is not anything of that kind in the Act depends entirely upon the clause of reservation in favour of the lord of certain rights—which clause is to be found at pages 7 to 9 of the Special Case—and the proviso which follows that clause of reservation. The reservation, though it includes mines, is by no means confined to them: it is plainly a reservation of the pre-existing interest of the lords in the manorial rights and royalties, and rights also in the soil which previously belonged to them as lords of the manor It says that nothing in the Act "shall prejudice, lessen or defeat" their right, title and interest "to these things, but they and their successors shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony or borough incident, appendant and belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be enclosed as aforesaid), in as full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." So far we have nothing but reservation of pre-existing rights, and that not in terms specially applied to mines and minerals, although including them, not in terms from which an intention to deal specifically with powers connected with those mines and minerals can be inferred—in terms which are as much applicable to everything else mentioned as they are applicable to the mines—no doubt not less applicable to the mines than to the other things which are mentioned.

Well, now, what is there in that clause of reservation which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words "in as full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same" (which means, as I understand it, held and enjoyed those rights, titles and interests which are reserved) "if this Act had not been made." Now, applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were with the mines to have all usual powers and surface privileges over them. Supposing in the clause of reservation these words had been expressly inserted, "reserving the mines

and minerals with all usual powers and surface privileges for working them," would that have given a right to let down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not, and, as was pointed out in the case referred to at the bar, the *Duke of Buccleugh* v. *Wakefield* (1), it is impossible to understand such words as reserving the previous rights of working exactly as they were, without reference to the fact that an enclosure had been made, and as if the rights of common still continued to exist, and the rights of working were subject to the rights of common. The right given by those words must, in that respect, although it is still a right to be held and enjoyed in a full, ample and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after enclosure, and against the owners of allotments, and no longer as against the commoners.

But let us consider what was the nature of the enjoyment which existed before the enclosure. I apprehend that before the enclosure, as much as afterwards, the lords, in the exercise of their powers as to the minerals, were subject to the principle *Sic utere tuo ut alienum non lædas*. They had not a right of working paramount to the surface rights of the commoners: they had only a right of working subject to the surface rights of the commoners; and any working which would substantially interfere with those surface rights would have been an unlawful working, and might have been restrained at the suit of the commoners. The only ground for saying that they might lawfully from time to time have let down portions, and perhaps ultimately the whole, of the surface is this: that they might have done so without injuring the surface rights of the commoners. They would not then have infringed upon the principle *Sic utere tuo ut alienum non lædas*. No *damnum*, no injury, would have been suffered by the commoners, and therefore they might have been subject to no action and to no restraint. But now the commoners, giving up the whole of their common rights, take in lieu of them these allotments. Why should not the lord, in his altered position, with his reserved rights, be subject in respect of those allotments to the principle *Sic utere tuo ut alienum non lædas*, in its full extent, as much as he was before? I quite agree with what I think one of the learned Judges in the Court of Appeal suggested on that subject, namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation, if it stood alone, must be construed subject to the surface rights of the persons to whom the allotments had been made.

Then we come to the words of the proviso. Now I quite agree that we should not be fettered by form if we find in substance in the proviso something tending either to enlarge, or to explain in such a way as to enlarge, the effect of the reservation; but still we approach that proviso with due regard to the fact that what we have already seen is a reservation only, not a grant, by Act of Parliament or otherwise, of privileges which a mere reservation would not have conferred, and that this proviso which follows has for its office to deal with the compensation to be made for the exercise of the reserved rights, so far as relates to those two particular subjects by which the surface might possibly be affected, namely, the working of the mines and the power of laying or using way-leaves, two subjects which throughout this proviso are separately kept in view.

Well, it appears to me that here the principles already mentioned throw, at all events as strongly as before, upon the appellants the duty of shewing that there are words which dispense, in their favour, with the general rule of law, and give them a right to let down the surface and deprive the surface owner of his ordinary right of support. I can find no such words. It is contended, however, that the usual powers of working mines do involve some right of interference with the surface, and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shews more than this, that it is contemplated that in the working of mines, as well as in the use of way-leaves,

there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow because the effects on the surface are contemplated which are provided for in the way of compensation? The whole proviso, in my opinion, is satisfied by only the ordinary surface damage such as might arise from the exercise of the usual working powers.

Now, the more the detail is examined, the more strongly am I led to the affirmative conclusion that that is what was meant, and all that was meant. The detail tends to repel, instead of to support, the appellants' construction. First of all it refers to the working of the "mines lying within or under any of the allotments," and to "satisfaction for the damages and spoil of ground occasioned thereby." I pause for a moment to observe that the word "ground" occurs, I think, four times over in the passage; and really, it strikes me, to say the least, without dwelling too much upon it, as indicating the ordinary surface damage to the surface of the ground, and not at all damage such as might happen in the case of buildings, with which we are now dealing. Therefore it confirms, as far as it goes, the view which, as I have said, I take of the clause as a whole.

Well, but that is not all: for who is to receive this compensation? "The person or persons in possession of such ground at the time or times of such damage or spoil." It is manifest that the Legislature thought that compensation should be made to the proper person. But is it to be for a moment imagined that in the case with which we are dealing, of injury to buildings erected upon the ground, which by possibility might be entirely destroyed, justice would be done by giving the compensation not to everybody injured, who would be the owner of the freehold, but to his tenant, to the person who might happen to be in possession at the time when the damage was done? There is then a limit, which limit is measured by the yearly value of "5*l.* for every acre of ground so damaged or spoiled"—a reasonable limit enough, probably, for such surface damage as might arise from the exercise of the ordinary powers, which would not extend to the destruction of the surface or of the buildings upon it, but, to my apprehension, a most improper, a most unreasonable, and a most unjust limit if it had been intended to take away the ordinary right of support. It was said upon this, "Oh, but it must be supposed that it was never contemplated that there would be any buildings at all upon that ground, it does not appear that there were any at the time, and therefore we are to infer that the sort of improvement contemplated by the Act was the conversion of this moor-land into agricultural land and nothing more." But is it not perfectly extravagant to suppose that that was the only possible improvement of this land, there being no restriction whatever upon the mode of improvement which the persons into whose hands it might come might think expedient? The very principle of improvement and enclosure is that the land should be improved, to the extent of its capacity, by those persons who have the altered tenure and who would have an interest in improving it. Even if it had been let as agricultural land, we are not to assume that it was all let out to neighbouring farmers who had already sufficient farm buildings for all the purposes of agricultural cultivation. Even upon that hypothesis, it cannot be imagined that it was out of contemplation in this improvement that there might be a residence for a farmer, a suitable house for him to live in, with stables, yards, and proper outbuildings, the damage to which buildings would be of a very serious kind in no degree whatever compensated under this clause. But the truth is that there is no ground for any such contention. Of course the neighbourhood of the mineral works might make it a convenient and profitable mode, in using the land, to erect upon it cottages for persons employed in the mines; or the owner might wish to reside near the mines, and therefore erect a house for himself. Consequently it is quite clear that we must take into account damage to

buildings as well as other things. For damage to buildings this mode of compensation would be quite inappropriate, but it would not be necessary if the right of support exists.

No authority whatever was cited in support of the appellants' argument except the case of *The Duke of Buccleugh* v. *Wakefield* (1), which appears to me to differ from the present case in every material particular. In the first place, the words to be construed there were not words occurring in an enumeration of various rights reserved of different kinds, but they were words bearing direct and special application to the subject of mines, minerals and mineral working; and in connection with that it was said that the lord was to retain his former status and to exercise his powers, not in the same way as if the Act had not been made (which words occur here), but, the words are very emphatic and very remarkable—namely, in the same way as "if the lands had remained open and unenclosed"; that is to say, that for the purpose of giving effect to the reservation in the lord's favour and the rights expressly conferred upon the lord by the Enclosure Act, the hypothesis of the lands remaining in an unenclosed state was, as between him and the surface owner, established by the Act, and that was pointed out as one of the reasons for the conclusion which was arrived at by one of the noble and learned Lords who then advised the House. But, secondly, there was not there a mere reservation, but there were words operating by themselves to confer, by the authority of the Legislature, upon the lord, in respect of the exercise of those reserved rights, a great number of privileges, expressly enumerated, and affecting the surface, which might or might not, but probably would not, have followed from the mere reservation. And Lord Hatherley, in advising the House as to its judgment, said that that enumeration of those rights, granted and not merely reserved by the Act of Parliament, was the reason which mainly weighed upon his mind in leading him to the conclusion to which he came, he finding in those words, not indeed in express language a power to let down the surface, but what he thought was practically equivalent to it—namely, a power totally and permanently to destroy the surface and to take away the beneficial enjoyment of any part of it from the persons to whom the allotment had been made. And, thirdly, there was there (which was also much and justly relied upon) an absolute and unqualified clause of compensation, so that, whatever might be the extent of the damage sustained full reparation for that damage would be made to whoever might be the person who sustained it. All those things were relied upon, and all formed ingredients in that judgment, but all are absent here.

I need say no more, but I move your Lordships to affirm the judgment appealed from, and to dismiss the appeal with costs.

Lord Watson.—The respondents are the owner and tenant of a parcel of a moor or waste within the manor of Elvet, allotted to the predecessors in title of the former, by statutory commissioners acting under an Enclosure Act of 1772, in respect of, or as appurtenant to, their ancient freehold or leasehold dwelling-houses within the manor; and the Act provides that such parcel of land shall be "held and enjoyed" by the allottees "in the same manner" and by the same tenure as the dwelling-houses, in respect of which the allotment was made, were then holden. The appellants are mineral lessees under the dean and chapter of Durham, the lords of the manor of Elvet, to whom are reserved, by the express terms of the Act, all mines within the limits of the divided waste, with power to work the same.

The respondents, being thus in right of the surface, are entitled to have it supported by the subjacent strata, unless the appellants can shew that by the terms of the statutory reservation in their favour the lords of the manor have the right to let it down in the course of their mineral workings. The principles of law applicable to a case like the present are, in my opinion, precisely the same with those which govern the mutual rights of the respective owners of the surface and of the minerals below, when the *plenum dominium* of the land has been split into these two estates by grants proceeding from a common author.

The Act of 1772 declares that nothing therein contained shall prejudice the title

or interest of the dean and chapter in and to the "royalties" incident to the manor, but that they and their successors shall ever thereafter "hold and enjoy" (*inter alia*) all "mines," and that "in as full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." After the judgment of this House in *The Duke of Buccleugh* v. *Wakefield* (1), an authority upon which the appellants rely, I think it is impossible to hold that a reservation expressed in these terms is *per se* sufficient to give the lords of the manor a right to work their minerals so as to let down the surface. In *The Duke of Buccleugh* v. *Wakefield* (1) Lord Chelmsford said that the Duke "must establish his right to work his mines notwithstanding the inevitably injurious consequences to the respondent's surface, by proof either of a custom within the manor, or of an authority derived from the Act for enclosing the wastes of the manor." Here the existence of such a custom within the manor as would sustain the right asserted by the appellants is negatived in the joint case for the parties. It was no doubt decided in *The Duke of Buccleugh* v. *Wakefield* (1) that his Grace had the right which he claimed, under the provisions of the Special Enclosure Act; but there the clause of reservation, besides expressly authorising a great variety of enumerated operations, both above and below ground, some of which involved the disturbance, if not the destruction, of the surface, concluded with a general power to the mine owner to do all further and other acts whatever for getting the said mines and minerals, and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner as if the lands had remained open and unenclosed, or the Act had not been passed.

The terms of the reservation to the dean and chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *The Duke of Buccleugh* v. *Wakefield* (1), a clause which, to use the words of Lord Hatherley, conferred the "largest imaginable power" upon the owner of the mines; yet in that case the decision of the House was given in his favour, not because the clause *per se* enabled him to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by Lord Justice Mellish in *Hext* v. *Gill* (14), that "no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion." But the contrast between the compensation clauses in that case and the present is also very marked. There every person whose interest in the surface was injuriously affected was to be fully indemnified. Here, under the Act of 1772, no one is to receive compensation except the occupant of the surface for the time being; the amount of compensation payable is restricted to 5*l.* per annum for each acre of surface damaged; and all liability on the part of the mine owner to pay that restricted sum ceases the moment he desists from working. No compensation is provided to the owner of the surface who is not in the personal occupation of it during the time of working, though his property may be permanently injured; and even if he does occupy himself, he is not to be compensated for any damage accruing (as, for instance, from subsidence) after the workings have ceased. A compensation clause in these terms, so far from suggesting or supporting the inference that the mine owner was to have power to let down the surface, points to the very opposite conclusion.

I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention of such a clause, to define or extend the powers given to the mine owner; and it is frequently *ob majorem cautelam* and in the interest of the landowner, expressed in comprehensive terms so as to include every

(14) 41 Law J. Rep. Chanc. 761; Law Rep. 7 Chanc. 699.

species of damage which may result from operations which are consistent with giving support to the surface. The clause may nevertheless be so expressed as to explain the character and extent of these powers, as was the case in *Aspden* v. *Seddon* (8), where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not of itself have warranted letting down the surface; but it was made subject to the condition that the person working the mine should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable if not a necessary inference in that case that the kind of underground working contemplated and sanctioned was such as would cause subsidence and injure buildings erected on the surface. But any such inference derived from the terms in which compensation is provided must, in my opinion, be plain and unequivocal, otherwise general words which were only meant to include every possible injury that could be caused by working without disturbance of the surface might be construed as a power to let it down.

I agree with your Lordships that the judgment appealed from ought to be affirmed.

Lord Bramwell.—I also am of opinion that this judgment should be affirmed. Before the enclosure award the dean and chapter were owners of the soil, the surface, and all in it and under it, subject indeed to a right of common, the existence of which, however, seems to me immaterial. By that Act and the award they ceased to be owners of the soil generally, but remained owners of the minerals. If there had been nothing more in the Act, the dean and chapter would have had no right to touch the surface to get the minerals; and, if all the right the Act gave them was to use such part of the surface as was necessary to get the minerals, they would have no right, in getting them, to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting the minerals except what the instrument of severance gives him; and if it gives the right to get the minerals without more, there is no right to let down the surface. This is well put, indeed the subject generally and the questions which arise in this case are very well treated in *McSwinney on Mines, Quarries and Minerals*, 293 to 334.

The appellants in this case say that rights are given to the dean and chapter by the Enclosure Act, not only to interfere with the surface to get the minerals, but also to let it down, and they rely on the general words that the dean and chapter are to hold and enjoy the mines "in as full, ample and beneficial manner as they could or might in case this Act had not been made." I cannot agree: for it is clear to me that that does not relate to working, but to property. The section begins, that the title of the dean and chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened or defeated by anything in the Act; "but that" they, as owners of the royalties, shall hold and enjoy all rents, mines, &c., to the owners of the manor incident, belonging or appertaining. This relates to property. The power of working, so far as given, is in the next section. Supposing that the previous section would, without the subsequent, give the right claimed, it would give it without compensation. But the subsequent section being there shews what is to be compensated, and consequently limits the meaning which the former section might have if it stood alone.

The appellants further say that the power is to be found, not indeed in express words, but as the result of the provisions for compensating the owner, which it is said include all kinds of damage, and therefore subsidence. I do not know if the antecedent probabilities are in favour of the respondent or the appellant. If the appellant is right, inasmuch as he contends that he may let down and destroy a house, and admits that for that adequate compensation is not provided, it follows, that until the minerals are exhausted and subsidence finished, the owner of the soil cannot use it to its best advantage. On the other hand, if the respondent is right, the owner of the minerals can rightfully take half of

them only, and might be stopped from taking anything the result of which would be subsidence of the surface. Either way there seems a loss.

We must examine the statute to see on whom it falls. And the problem we have to solve is a very common one—namely, what provision has been made for a case not contemplated. I say a very common one, for it continually happens that extensive words are used to comprehend cases not particularly contemplated. As I have said, the appellant does not say that the right he claims is given in express words, but that it is shewn by the provision for compensation for damage. I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainderman. The statute uses the present participles "working," "laying," "making," "using," and says that satisfaction shall be made for the "damage" and "spoil of ground" occasioned thereby, to the person in possession at the times of such damage and spoil, and the damage is to be paid yearly during the time of working, or continuing or using such ways, for every acre so damaged. This, I think, clearly contemplates temporary damage during the working, from which the person in possession alone suffers. It is impossible to say subsidence is included in this, for the subsidence may not take place till long after the working. Certainly subsidence where a house or a barn is let down is not contemplated. As to that, however, it may be said it is the folly of the landowner to build it. But, even without any house being built, the damage by subsidence is permanent: the level of the surface is destroyed, and if any gap or steep descent is made the landowner would have to fence. Anyhow, subsidence is a permanent damage, and may be long after the working. There is no provision for compensating for that.

I am not insensible to the force of the argument of the Solicitor-General. He says, if the argument for the respondent is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the Legislature has thought that compensation to the person in possession was enough, and if so, why is not the same true of subsidence, it being always the surface which is injured. This is a strong argument. It is singular that no express power is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be "incident" to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that, because no provision is made for compensation to the reversioner for one permanent damage, there is therefore a right to inflict on him another one, which may damage him only and not the person in possession during the working.

In the result, it seems to me that the compensation is to be for what the Legislature considered damage to the person in possession during working; that if it has authorised shafts and spoil, it has considered them damages to that person, or sufficiently compensated for by payment to him—or forgotten the matter—anyhow that it has not provided compensation for subsidence, and consequently has not authorised it being caused.

Order appealed from affirmed; and appeal dismissed, with costs.

Solicitors—White, Borrett & Co., for appellants; Munns & Longden, agents for E. Gleadowe Marshall, Durham, for respondents.

1883. Dec. 10. DINNING (*appellant*) *v.* THE GUARDIANS OF THE SOUTH SHIELDS UNION (*respondents*).

*Poor—Maintenance of Married Woman—Order on Husband—*31 *&* 32 *Vict. c.* 122 (*Poor Law Amendment Act*, 1868), *s.* 33.

[For the report of the above case, see 53 Law J. Rep. M.C. 56.]

[IN THE COURT OF APPEAL.]

1884. Feb. 29. April 4. THE SCHOOL BOARD FOR LONDON *v.* WRIGHT.*

School Board—Power of to recover by Action Unpaid Fees in Arrear—Implied Contract—Action on Statute—Elementary Education Acts (33 & 34 *Vict. c.* 75. *ss.* 17, 74, 92; 39 & 40 *Vict. c.* 79. *ss.* 4, 10, 11, 12; 43 & 44 *Vict. c.* 23. *s.* 2).

A school board has no power to recover by action fees unpaid and in arrear from the parent of a child who has attended one of the board schools and who has received education therein.

A parent who does not send with the child the school fees which are required to be paid does not cause that child to attend school within the meaning of the Education Acts.

Saunders *v.* Richardson (50 Law J. Rep. M.C. 137) *approved.*

Appeal from the judgment of the Queen's Bench Division, which held (Coleridge, C.J., dissenting) that the School Board for London could not recover fees unpaid and in arrear from the parent of a child who had received education in one of its schools.

The action was brought in a County Court by the School Board to recover school fees from the parent of a child who had attended a Board school in London. The Judge of the County Court nonsuited the plaintiffs, who then obtained a rule in the Queen's Bench Division to set aside that nonsuit and to enter judgment for them, which rule was afterwards discharged.

The School Board appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *D. Walker*, for the appellants.—If a parent sends a child to a school, and the child is received and educated there, a contract is implied in law that the parent will pay for that education; and the fact that this school is one established by the School Board for London does not prevent there being an implied contract in the present case. Nor does the fact that since 1876 the law has made it the duty of a parent to cause his child to receive sufficient elementary instruction (1) alter the implication of law; for the parent need not send the child to a School Board school: he can choose any efficient school and have the child educated there. The child must be educated; but the mode and place of education is left to the parent. Moreover, if a child has passed certain standards fixed by the Education Department, attendance is, after a certain age, no longer compulsory; and yet such a child may, and in many cases does, continue to attend a Board school.

[BRETT, M.R.—Can the School Board enter into such a contract as that which it is necessary to imply here? The Board cannot make terms as to the fees: those are fixed by authority. Can a Board school refuse to admit a child if there is room in the school?]

No doubt the Board fixes the scale of fees with the consent of the Education Department, but a private teacher also fixes the terms at which he will take a pupil; and the fee being fixed by law, the parent who sends his child must be taken to know what the amount is. The contention is that in such a case as this a contract is implied in law between the parent and the Board that the former will pay the fee, so that an action for debt will lie. No doubt, if any other remedy or mode of recovering the fee were given by statute, an action could not be maintained; but the statutes relating to this matter do not give any other remedy.

The local authority—that is, the School Board—can summon a parent for not sending a child to school (2), and get an attendance order made, and if that order is not complied with, then the parent may be fined; but the imposition of that penalty is not an alternative remedy given for the non-payment of school fees: the penalty does not go to the School Board, and it in no way affects the arrears of fees already unpaid. In *Saunders* v. *Richardson* (3) there was no statement as to the means of the parent; but the Queen's Bench Division held that to send a child to school

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

(1) 39 & 40 Vict. c. 79. s. 4.
(2) 39 & 40 Vict. c. 79. ss. 11, 12.
(3) 50 Law J. Rep. M.C. 137; Law Rep. 7 Q.B. D. 388.

without the necessary fees was not to comply with an attendance order made under 39 & 40 Vict. c. 79. s. 12. That case appears to have been decided on an impression that the by-law of that school district directed that the fees must be paid in advance, and made their payment a condition precedent to the admission of the child to the school. The by-law is not set out, and it would seem that there is no Parliamentary enactment to that effect, nor does it appear that such a by-law has ever been made. There is a resolution setting out what fees shall be charged, but no resolution as to the manner in which they shall be paid.

If an action for the price of the education received cannot be maintained, then it is submitted that an action will lie for the breach of the statutory duty to educate the child and to pay for that education the fee prescribed; for where a statute casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt on the statute—*Tilson* v. *The Warwick Gaslight Company* (4) and *Beckford* v. *Hood* (5).

33 & 34 Vict. c. 75, and 39 & 40 Vict. c. 79 (6), were referred to.

The respondent did not appear.

Cur. adv. vult.

(4) 4 B. & C. 962.

(5) 7 Term Rep. 260.

(6) 33 & 34 Vict. c. 75. s. 3: "In this Act . . . . the term 'parent' includes guardian and every person who is liable to maintain or has the actual custody of any child."

Section 53: "The expenses of the School Board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars. . . ."

Section 74: "Every School Board may from time to time, with the approval of the Education Department, make by-laws" for the attendance of children at school.

39 & 40 Vict. c. 79. s. 4: "It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading and writing and arithmetic; and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by this Act."

Section 10: "The parent, not being a pauper, of any child who is unable by reason of poverty to pay the ordinary fee for such child . . . . may apply to the guardians, . . . and it shall be the duty of such guardians, if satisfied of such inability, to pay the said fee. . . ."

BAGGALLAY, L.J. (on April 4), delivered the judgment of the Court:—

The question involved in this appeal is, whether a parent who has caused his child to attend a Board school duly established under the provisions of the Elementary Education Acts, but who has omitted to pay the prescribed fees in advance, can be sued in a County Court for the arrears of such fees.

The action was commenced by the London School Board in the Westminster County Court, to recover from the defendant the sum of one shilling and sixpence for school fees alleged to be due from him for the tuition of his daughter in the James Street Buckingham Gate school, which is an elementary public school established by the plaintiffs within the school district of the metropolis.

Upon the trial of the action, the Judge of the County Court nonsuited the plaintiffs, upon the ground that arrears of Board school fees were not a debt recoverable in an action. On the 5th of July last, a rule which had been obtained in the Queen's Bench Division, requiring the defendant to shew cause why the nonsuit should not be set aside and judgment entered for the plaintiffs, or why a new trial should not be had, was discharged; but the Court was not unanimous, Mr. Justice Denman and Mr. Justice Manisty holding that the rule should be discharged, while the Lord Chief Justice was of opinion that the judgment of the County Court Judge should be reversed.

From this judgment of the Divisional Court the present appeal has, by the leave of that Court, been brought.

On behalf of the School Board the case was argued before us, as it had been in the Divisional Court, by the Solicitor-General; but the defendant has not been represented by counsel, nor has the case been argued on his behalf on either occasion.

In the course of his argument it was contended by the Solicitor-General—first, that apart from any obligation on the defendant, under the provisions of the Elementary Education Acts, to cause his child to attend a Board school or other certified efficient school, the fact of his sending his child to such a school imposed upon him

an obligation to pay the reasonable charges for the tuition given; and, secondly, that the provisions of these Acts, and the by-laws made under them, imposed upon the defendant an obligation to cause his child to attend an efficient elementary school, and that, having thought fit to send her to the James Street school, he was under an obligation to pay the prescribed fees for her tuition; and, further, that having omitted to pay such fees in advance, he could be sued for the arrears in the County Court.

As between these two contentions, the Solicitor-General stated that he preferred to rely upon the former; but, in the view which we take of the case, it will be more convenient to consider the latter first. The question whether the second contention is well founded can only be solved by an examination of the Elementary Education Acts. They are four in number—namely, 33 & 34 Vict. c. 75, passed in 1870; 36 & 37 Vict. c. 86, passed in 1873; 39 & 40 Vict. c. 79, passed in 1876; and 43 & 44 Vict. c. 23, passed in 1880.

The object which the Legislature had in view in passing these Acts is indicated by the preamble to that of 1876, in which it is declared to be "expedient to make further provision for the education of children and for the fulfilment of parental responsibility in relation thereto." The only sections of the Act of 1870 which we deem it necessary to examine in detail are those numbered 17, 25, 74 and 92; but it may be noted that by the sections previous to that numbered 17, provision is made for a supply of public elementary schools in the metropolis and elsewhere, and for the formation of School Boards to discharge the several duties imposed upon them by the Act.

Section 17 is in the following terms: "Every child attending a school provided by any School Board shall pay such weekly fee as may be prescribed by the School Board with the consent of the Education Department; but the School Board may from time to time, for a renewable period not exceeding six months, remit the whole or any part of such fee in the case of any child, when they are of opinion that the parent of such child is unable from poverty to pay the same."

The weekly fee for girls attending the James Street school has been duly prescribed at threepence.

Section 25, though repealed by the Act of 1876, may be referred to in aid of the general interpretation of the Act of 1870; it provides that "the School Board may, if they think fit, from time to time . . . . pay the whole or any part of the school fees payable . . . . by any child resident in their district whose parent is, in their opinion, unable from poverty to pay the same." This section, though repealed by the Act of 1876, is replaced by section 10 of that Act, which substitutes the parish guardians for the School Board as the authority by whom the school fees are to be paid in the case of any child whose parent is unable by reason of poverty to pay them.

Section 74 enacts that any School Board may from time to time, with the approval of the Education Department, make by-laws for all or any of the five several purposes therein mentioned. Of these the 1st and 4th are in the following terms:—

"1. Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school."

"4. Imposing penalties for the breach of any by-laws"; and by the same section 74 it was further enacted that "any proceeding to enforce any by-law may be taken, and any penalty for the breach of any by-law may be recovered, in a summary manner; but no penalty imposed for the breach of any by-law shall exceed such amount as, with the costs, will amount to 5*s.* for each offence; and such by-laws shall not come into operation until they have been sanctioned by Her Majesty in Council."

Section 92 provides that any penalty which under the Act was made recoverable summarily, and all proceedings which under the Act might be taken in a summary manner, might be recovered and taken before two Justices in manner directed by the statute 11 & 12 Vict. c. 43.

The several sections of the Act of 1870 to which we have referred are not expressed in as clear language as could be desired. The earlier portions of both section 17 and section 25 in terms refer to the school fees as being payable by the child attending the

school; though the concluding portion of the former provides for the remission by the School Board, and that of the latter for the payment by the School Board, of such fees, if, in their opinion, the parent of the child is unable to pay them. Section 74 also, though it provides means by which the parent may be made responsible for the attendance of his child at school, and liable to penalties if such attendance is not given, makes no express provisions for the payment by him of the school fees.

Of the scope and effect of an Act so unsatisfactorily framed it is difficult to form a confident opinion. It could not have been the intention of the Legislature that the child should itself provide the means to pay the school fees; on the other hand, nothing would have been easier, had it been so intended, than to have imposed the obligation upon the parents in such terms as to enable the School Board to sue them if they were not paid. The language used throughout the Act is suggestive that it was the intention of the Legislature that, in some way, the parent should be made responsible for the school fees; but suggestion is not sufficient to impose such an obligation as could be made the foundation of an action similar to that with which we are now dealing, especially when there is a clear indication of the intention of the Legislature that the responsibility of the parent should be declared and enforced by by-laws. It will be observed that by the 73rd section of the Act provision is made for holding public enquiries for the purposes mentioned in the Act, and for the payment of the costs of the proceedings by such parties as the Education Department may direct; and it is further provided that the costs, by whomsoever payable, may be recovered as a debt. The omission of any similar provisions as to the recovery of school fees is significant.

We pass on to consider the provisions of the Acts of 1873 and 1876. The only section in the Act of 1873 to which it is necessary to refer is that contained in subsection 3 of section 24, by which it is enacted that "in any proceeding for an offence under a by-law the Court may, instead of inflicting a penalty, make an order directing that the child shall attend school; and that if he fail so to do, the person on whom such order is made shall pay a penalty not exceeding the penalty to which he is liable for failing to comply with the by-law." In this section we see a somewhat insufficient provision for the making of an attendance order, for which, as will presently appear, more efficient provision is made by the Act of 1876. The principle, however, of punishing for disobedience of by-laws by the imposition of penalties of limited amount is extended to an attendance such as is provided for by the sections just quoted.

The sections of the Act of 1876 which demand our attention are those numbered 4, 10, 11 and 12.

By section 4 it is enacted that "it shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing and arithmetic, and if such parent fail to perform such duty he shall be liable to such orders and penalties as are provided by this Act." The language of the latter part of this section is very suggestive that it was by penalties, and by penalties alone, that performance of the duty imposed by the earlier part should be enforced. Section 10, as before mentioned, substitutes the parish guardians for the School Board as the authority by whom the school fees are to be paid in the case of any child whose parent is unable by reason of poverty to pay them.

But sections 11 and 12 introduce further provisions for securing the attendance of children at school. By section 11 it is provided that if the parent of any child habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for his child, or if any child is found habitually wandering or not under proper control, it shall be the duty of the local authority (being the School Board and school attendance committee, appointed as by section 7 of the Act directed) to complain to a Court of summary jurisdiction, and such Court, if satisfied of the truth of such complaint, may order that the child shall attend some certified efficient school, and the child shall attend that school every time that school is open, or in such other manner as is specified in the order. And section 12 provides that where an attendance order is not complied with, a Court of sum-

mary jurisdiction, on complaint made by the local authority, may impose a penalty not exceeding, with the costs, five shillings. These sections of the Act of 1876 effect little more than to make statutory provisions for what could have been effected by by-laws under the earlier Acts; but the principle which pervades the earlier Acts of imposing penalties for disobedience, and of limiting the amounts of such penalties and of the costs to which the offender might consequently become exposed, is as clearly indicated in the later Act.

Since the passing of the Act of 1876 by-laws have been duly made for the metropolis, under the powers conferred upon the London School Board by section 74 of the Act of 1870 as amended by the Act of 1876. The by-laws so made were in substitution for all by-laws previously made, and were in force during the time that the defendant's daughter attended the James Street school. The 2nd of these by-laws required that the parent of every child of not less than five nor more than thirteen years should cause such child to attend a certified efficient school, unless there was a reasonable cause for non-attendance; and the 4th provided that every parent who should not observe, or who should neglect or violate, the by-laws then made, or any of them, should, upon conviction, be liable to a penalty not exceeding, with the costs, five shillings for each offence. What, then, having regard to the provisions of the several beforementioned Acts, and to the by-laws made under the powers conferred by them, was the position of the defendant at the time when his daughter was receiving tuition in the James Street school?

Under the combined operation of section 4 of the Act of 1876 and of the 2nd by-law, it was his duty to cause his daughter to attend a certified efficient school; she did, in fact, attend the James Street school, and received tuition there for a period of six weeks. But did he cause her to attend such school within the intent and meaning of the Elementary Education Acts? He did not pay in advance, or at all, the prescribed weekly fee of threepence; and the action is brought to recover the fees for six weeks. It has not been suggested that he was unable, by reason of poverty, to pay the fees, or that he applied, under section 17 of the Act of 1870, to the School Board to remit them, or, under section 10 of the Act of 1876, to the guardians to pay them for him, or that there existed any other reasonable cause for his daughter's non-attendance. It must be assumed, then, at any rate for the purposes of the present appeal, that the defendant was able to pay the prescribed fees. Such being the position of the defendant, we are of opinion that it was his duty, when sending his daughter to the James Street school, to provide her with the means of paying (or, in other words, to pay for her) the prescribed school fees, which, by section 17 of the Act of 1870, she was in terms required to pay; and that, having neglected or failed to perform this duty, he did not cause her to attend the school within the intent and meaning of the Education Acts. This view of the duty of a parent able to pay in respect of the school fees payable for his child's attendance at a Board school, is in accordance with that expressed by all the five Judges who decided the case of *Saunders* v. *Richardson* (3) in the Queen's Bench Division, and is, in our opinion, supported by the language used in the Education Acts.

If the defendant's daughter had been refused admission into the school, on the ground that she had not brought the weekly fee with her, we entertain no doubt but that on his continued refusal to pay it the defendant would have been liable to be convicted under the 4th by-law for non-observance of the 2nd.

We gather, however, that not only was no objection taken to the admission of the defendant's daughter on the ground that the school fee had not been paid in advance, but that the defendant was in no way called upon to pay any fees at all until after his daughter's attendance had ceased, when he was called upon to pay what have been termed the "arrears." We are of opinion that the plaintiffs have no right whatever to recover from the defendant the amount of fees so alleged to be due from him, and that this amount is not, in fact, due from him. If the plaintiffs had done that which was in their power to do, they might have prevented his daughter from attending the school until he had

paid the fees in advance, and he could have been punished by the imposition of penalties; but the provisions of the several Acts negative any intention on the part of the Legislature that a parent should be sued for fees as for a debt, or that recourse should be had to any means to procure their payment other than the imposition of penalties for neglect to pay them.

The intention of the Legislature to rely upon penalties, as the means of securing the carrying out of the objects of the Acts, is further evidenced by the Act of 1880, the title of which is, "An Act to make further provision as to by-laws respecting the attendance of children at school under the Elementary Education Acts."

The 2nd section of that Act is as follows:—"It shall be the duty of the local authority (within the meaning of the Elementary Education Act, 1876) of every school district in which by-laws respecting the attendance of children at school under section 74 of the Elementary Education Act of 1870 are not at the passing of this Act in force, forthwith to make by-laws under that section for such district"—that is to say, by-laws requiring the parent to cause his child to attend school, and imposing penalties for disobedience or neglect.

It has evidently been an object of the Legislature in framing the several education Acts to make the obligations upon parents to send their children to school as little burdensome as possible. The penalties for neglecting to discharge that obligation are made recoverable in a summary manner, and in no case is the amount of the penalty, with the costs of imposing it, to exceed five shillings for each offence.

The liability to a penalty of this amount will in all ordinary cases be sufficient to induce a parent capable of paying threepence to pay it. If he is unable to pay it, he can obtain a remission, or have it paid for him, in the manner pointed out by the Acts. But if a parent were allowed credit for the school fees, with the consequent liability to be sued for arrears, the burden might become intolerable; the arrears might be small, but even if small the cost of the proceedings to recover them would be out of all proportion to the amount at stake. Moreover, it must be borne in mind, that if an action lay on the statute, in the technical sense of that expression, it might be brought at any time within twenty years after the right of action accrued, and the amount sued for might be a very serious sum for a poor person to pay, quite irrespective of the costs. It is to be observed, also, as was pointed out by Mr. Justice Denman in the Divisional Court, that the word "parent," as used in the several Acts, includes a guardian, and every person who is liable to maintain, or has the actual control of, any child, and consequently includes persons whose common law liability cannot be put so high as that of a father of a young child between the ages of five and thirteen. It would be contrary to the whole scheme of the Education Acts that credit should be given, and the Legislature has acted wisely in limiting the means for enforcing payment of penalties of small amount to be recovered in a summary manner as inexpensively as possible.

The conclusions at which we have arrived are that we agree to the first proposition involved in the contention of the Solicitor-General, that the defendant was under an obligation to cause his child to attend an efficient elementary school; that as regards his second proposition, that, having thought fit to send her to the James Street school, he was under an obligation to pay the prescribed fees for her tuition, we assent to it to the extent that it was his duty to pay the fees in advance; but that we are unable to assent to his third proposition, that the defendant, having omitted to pay the fees in advance, can be sued for the arrears.

It remains to consider the first contention of the Solicitor-General, that the fact of the defendant sending his child to a Board school imposed upon him an obligation to pay the reasonable charges for the tuition given.

If the sending of his child to school had been a purely voluntary act of the defendant, like sending her to the baker's shop for a loaf of bread, as suggested by the Solicitor-General by way of illustration, there would have been great force in the argument; but we cannot regard his sending her to the James Street school as a purely

School Board for London v. *Wright, App.*

voluntary act: he was under an obligation to cause her to attend a certified efficient school, "unless there was a reasonable cause for non-attendance," which it is not suggested that there was. It does not appear whether the James Street school was the only certified efficient school within reasonable distance of his residence. If it was, he had no option in the matter; if it was not, then to the extent of his selection of the James Street school it was a voluntary act on his part; but thus far only, for if he had not sent her there, he must have sent her to some other "certified efficient school." The causing her to attend some certified efficient school was obligatory, but he may have had a power of selection as to the school to which he would send her.

Under such circumstances his sending her to school was compulsory, and he did not, in our opinion, come under any such obligation to pay for her tuition.

For these reasons the appeal must be dismissed.

Judgment affirmed.

Solicitors—Gedge, Kirby & Millett, for appellants.

[IN THE HOUSE OF LORDS.]

1883. May 4, 7. June 4. THE JUSTICES OF THE PEACE FOR THE WEST RIDING OF THE COUNTY OF YORK *v.* THE QUEEN (*on the prosecution of* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF SHEFFIELD).

Highway—Liability to repair—Turnpike Road—Main Road—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

[For the report of the above case, see 53 Law J. Rep. M.C. 41.]

1884. March 4, 6. THE LONDON SCOTTISH BENEFIT SOCIETY *v.* CHORLEY AND OTHERS.

Practice — Costs — Taxation — Solicitor acting in his own Cause—Right to Profit Costs.

A solicitor who successfully defends an action in person is entitled, upon taxation, to the same costs as if he had conducted the action as solicitor for some other person, and not merely to the costs to which another person suing or defending in person would be entitled.

The defendants were members of a firm of solicitors carrying on business under the title of Messrs. Chorley, Crawford & Chester, and had successfully defended in person an action brought against them by the plaintiffs.

The question arose, upon taxation, whether a solicitor defending in person was, if successful, entitled only to costs out of pocket, or, in addition, to the usual profit costs of a solicitor.

The Master had allowed the costs, and, upon appeal to the Judge at chambers, the matter was referred to this Court.

Alfred Cock, for the plaintiffs.—It is submitted that a solicitor successfully defending an action in person is only entitled to such costs as another person suing or defending in person would be entitled to. It is true that in *Archbold's Practice*, as well as in other text-books, it is laid down that "where an attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as attorney for some other person, and not merely to the costs which another person suing or defending in person would be entitled to;" but the authorities cited in support of that proposition do not sanction such a practice. Those authorities are *Jervis* v. *Dewes* (1), *Parsloe* v. *Foy* (2) and *Leaver* v. *Whalley* (3). In *Jervis* v. *Dewes* (1) the solicitor, who was a party to the suit, employed a London agent, whose name appeared on the record as attorney for the solicitor,

(1) 4 Dowl. 764.
(2) 2 Dowl. 181.
(3) 2 Dowl. 80.

and the *ratio decidendi* of that case was that the business must be considered as having been done through the London agent. In *Parsloe* v. *Foy* (2) and *Leaver* v. *Whalley* (3) the solicitor employed a London agent, and the only question was as to what expenses a solicitor was entitled to, in the one case for appearing as a witness, and in the other for attending the trial. In *Sclater* v. *Cottam* (4) the exact point was raised, but not actually determined. Such charges as these cannot fairly be included under the statute of Hen. 8, which gave a successful defendant his costs. The decision in the Privy Council in *Gugy* v. *Brown* (5), which decided that an attorney acting as such in his own cause was entitled, under a judgment *avec depens*, upon taxation of costs, to the same fees as were allowed to attorneys in all ordinary cases, turned on the meaning of the word *depens*, and does not affect the question now before the Court. A successful defendant became entitled to costs under the statute 23 Hen. 8. c. 15, which enacted that a successful defendant should have "judgment to recover his costs"; but that statute never contemplated profit costs being recoverable under such circumstances as these. As pointed out by Bramwell, B., in *Harold* v. *Smith* (6), costs between party and party are in the nature of an indemnity to the person entitled to them.

Tindal Atkinson, for the defendants.—The rule is correctly laid down in *Archbold's Practice* and other text-books, and the cases cited, though not actually decisive on the point, favour the defendant's contention that profit costs ought to be allowed. Upon principle there appears to be no reason why these costs should be disallowed. As a matter of fact it is greatly to the advantage of an unsuccessful party to a suit when his opponent happens to be a solicitor and acts for himself, since there are some items of costs, such as "instructions to defend," which the solicitor, admittedly, could not charge. In *Price* v. *M'Beth* (7) profit costs were allowed, which ought to have been disallowed if the contention on the other side were well-founded. In *Sclater* v. *Cottam* (4) the decision was not that the solicitor should not have his profit costs in that suit, but that he should not have profit costs for defending two other suits, which costs he claimed in the nature of just allowances to him as a mortgagee. See, also, the judgment in *Gugy* v. *Brown* (5).

Cock replied.

Cur. adv. vult.

Judgment was delivered on March 6, 1884, as follows:—

DENMAN, J.—This was an action brought by the plaintiffs against the defendants, who are a firm of solicitors. The defendants defended in person, and employed no agent. They succeeded and obtained judgment, and the question has arisen, upon taxation, whether, where a solicitor is a defendant and defends in person, he is entitled only to costs out of pocket, or to such costs as a successful defendant is ordinarily entitled to, save only such items as "instructions to defend," &c. The Master having decided in favour of the defendants' view, the matter was, upon appeal, referred to this Court, and the case therefore comes before us as if it were an original application to review the decision of the Master. It appears that there is some slight difference in opinion between the Masters on this side of the Court as to whether these costs ought or ought not to be allowed; and Mr. Cock has argued that no costs are to be allowed except in accordance with the terms of the statute allowing costs to be given, and has contended that no question can be raised founded merely on the relationship between the plaintiffs and the defendants. The origin of costs was due to certain ancient statutes, and no subsequent rules on the subject have at all affected the question whether, in taxing costs on behalf of a successful solicitor, the Master ought to include such costs as these. The Court must look at what is the proper practice with reference to the state of things which prevailed prior to the Judicature Acts. The judgment of Baron Bramwell in *Harold* v. *Smith* (6) is important, where it is laid down that costs must be by way of in-

(4) 29 Law T. Rep. 309; 3 Jur. N.S. 630.
(5) 36 Law J. Rep. P.C. 38; Law Rep. 1 P.C. 411.
(6) 29 Law J. Rep. Exch. 141; 6 Hurl. & N. 381.
(7) 33 Law J. Rep. Chanc. 460.

demnity. It has been argued that these costs are not costs in the sense of being an indemnity, because under the term "costs" are included only the actual costs which a person is put to. The argument is a plausible one, but it is not conclusive. Treating costs as equivalent to an indemnity, there is nothing to prevent a successful party who is a solicitor and does solicitor's work from being indemnified for loss of time and the pains and trouble which he has bestowed on the business. There is nothing to prevent costs from being applied to such a case even if you take the obvious meaning of the term "indemnity." Such costs are a fair indemnity for the labour and skill which a solicitor has had to bestow on his own case, and which he would have had to pay for had he employed a solicitor. A solicitor's time is valuable; he applies skill to a suit, whether he is bringing the action as plaintiff or is resisting an unjust claim. All this is due and owing to wrongful conduct on the part of his opponent. The Master has taken this work into consideration in taxing the costs, and it resolves itself into a mere point of practice whether these costs ought as a rule to be allowed to a successful solicitor. I agree that the cases which are cited in the text-books do not expressly decide this very point as it has been assumed they do in some of the books of practice; and there is this difficulty about the case—namely, that the practice has not been uniform. But though the cases themselves are not direct authorities that these costs ought to be allowed, it is laid down in a book of very high authority—*Lush's Practice*—as a point of practice, that they are; and I have reason to know that by far the majority of the Masters, both on the Queen's Bench and Chancery Divisions, make it a practice to allow them. My brother Manisty also states that the practice has always been to allow these costs, and, as he has had special opportunities of forming a judgment on this subject, his judgment is entitled to great weight. I am of opinion, therefore, that these costs were properly allowed, and that the practice regulating this matter is correctly laid down in *Lush*, *Archbold*, and other text-books. I may add that there is nothing unreasonable in such a practice and no hardship on the plaintiffs, who would have suffered still more if another solicitor had been employed.

MANISTY, J.—I am of the same opinion, and, as this is a matter of some importance, will make one or two observations. The judgment in this action was in favour of the defendants, who are solicitors, and who acted on their own behalf. It is said that on that account only out-of-pocket costs ought to be allowed; but it seems to me that there is a conclusive answer to the objection which has been taken. The reason why costs are allowed to a solicitor who is a party to the action, and not to a party appearing in person, is that the one is a solicitor and the other is not. It would be strange indeed if a person who is not a solicitor should be allowed solicitor's costs. But I fail to see any solid reason why, where the successful party is a solicitor, and is entitled to these costs as a solicitor, he should not be entitled to receive them. Time is money to a solicitor: and why should he not be remunerated for the time and skill he brings to bear upon the action? Again, it is really an advantage to the losing party when his opponent is a solicitor and acts for himself, as there would be many charges which he could not recover. The only doubt I felt is the fact that one of the Masters has assured me that in practice he has never allowed costs under such circumstances as these. It appears, however, that, though there is some division of opinion among the Masters on the common law side, the uniform practice on the Chancery side has been to allow these costs. If it came to be a question as to which practice ought to prevail, I am not sure that section 25, sub-section 11, of the Act of 1873 does not answer the question, although I am quite aware that on points of practice the rule has been to adopt the practice which seems to be most reasonable.

It is surely more reasonable that these costs should be allowed than that they should be disallowed. The rule as laid down in all the text-books is to the effect that they are to be allowed, although it is quite true that in most of them three cases are cited as authorities for the proposition which are not directly in point; but the

case of *Price* v. *McBeth* (7) is a distinct authority to that effect, provided the word "judgment" is substituted for "decree."

For all these reasons I think that the Master was quite right.

WILLIAMS, J.—I am of the same opinion. The question is one entirely of practice, and, had it been shewn that a uniform practice existed, that would have been decisive either way. But there has been, it appears, a slight variance in the practice, and we are therefore entitled to treat it as *res nova*, and, so treated, it appears to me correct in principle to allow the costs which are objected to. In order to determine the question it is necessary to refer back to certain old statutes, which, though they have been repealed, have been repealed in a somewhat remarkable manner by 42 & 43 Vict. c. 59. The last-mentioned statute, after reciting in the preamble that it is expedient that certain enactments should be repealed, including 6 Edw. 1. c. 1 (so far as material), 23 Hen. 8. c. 15, and 4 Jac. 1. c. 3, contains this remarkable provision in section 4—namely, that "the repeal effected by this Act shall not affect any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured, by or under any enactment so repealed."

Now I confess myself unable to solve the meaning of an enactment which, after repealing certain statutes, contains a proviso of this kind. But, whatever the effect of the repeal may be, it seems clear that the principle established by the earlier statutes still remains in force. Now, if one turns back to 23 Hen. 8. c. 15 and 4 Jac. 1. c. 3, it seems clear, from the policy and language of the Legislature, that these costs were intended to be allowed. Under 6 Edw. 1. c. 1 the plaintiff's right to recover costs for the expenses he had been put to was established, and by 23 Hen. 8. c. 15 a similar right was conferred on a successful defendant, which last-mentioned statute was further supplemented by 4 Jac. 1. c. 3, which gave costs in certain cases not provided for by 23 Hen. 8. c. 15. Now, I understand costs to include compensation for the trouble, expense and loss of time in consequence of being troubled by a vexatious action. If a skilled person employs his time and technical knowledge on a matter of this kind, I see no reason, either on principle or expediency, why time so spent and skill so directed should not be paid for. Accordingly, I think that, even if this were a new question, these costs ought on principle to be allowed; and, that being my opinion, this application must be dismissed, and dismissed with costs.

Application refused.

Solicitors—Harries, Wilkinson & Raikes, for applicants; Crawford & Chester, for defendants.

1884. March 22.

DAVIES *v.* WHITE.

Practice — Discovery — Inspection — Banking Account—Bankers' Books Evidence Act, 1879 (42 *Vict. c.* 11), *s.* 7.

In an action for goods sold and delivered, to which payment and a counter-claim were pleaded, the plaintiff, after issue joined, applied ex parte to a Judge at chambers, and obtained leave, under section 7 of the Bankers' Books Evidence Act, 1879, *to inspect the defendant's banking account. The order was served on the defendant's bankers, and they, on receipt of it, informed the defendant, who thus heard of the order which had been made. The defendant took out a summons before the same Judge to set aside the order, and obtained a variation of it by which the inspection was limited to the period within which the goods were alleged to have been sold and delivered:*— Held, *that, under the circumstances, the plaintiff was not entitled to the order for inspection.*

Per DAY J., *that in civil proceedings an application for such an order for inspection ought not to be made ex parte; and* semble, *that the power to grant the order ex parte is limited to criminal proceedings.*

Appeal from the order of Field, J., in chambers, allowing inspection of the defendant's banking account.

Davies v. *White.*

The action was brought to recover the sum of 568*l.* 8*s.* 3*d.* for goods sold and delivered by the plaintiff to the defendant from the 1st of March, 1879, to the 30th of September, 1883. The defendant pleaded payment, and made a counter-claim against the plaintiff for the sum of 416*l.* 14*s.* 7*d.* The plaintiff joined issue on the defence, and denied that he owed the amount alleged to be due on the counter-claim. Afterwards, on the 11th of March, 1884, the plaintiff applied *ex parte* at chambers and obtained an order from Field, J., under section 7 of the Bankers' Books Evidence Act, 1879 (1), whereby he and his solicitors were to be at liberty to inspect and take copies of and extracts from the books of the defendant's bankers relating to the defendant's account at the London and County Bank (2).

No notice of the application or order was given to the defendant, but a copy of the order was served on the London and County Bank. Before allowing the inspection the bank informed the defendant, who thus for the first time heard of the order. The defendant then took out a summons to set aside the order. Both parties appeared before Field, J., at chambers, on the 17th of March, and the learned Judge then varied the original order of the 11th of March by limiting the inspection of the defendant's banking account from the 1st of March, 1879, to the 30th of September, 1883.

Against these orders the defendant now appealed to the Divisional Court.

Bonsey (*Houghton* with him), for the defendant.

Witt, for the plaintiff.

DAY, J.—In this case I do not hesitate to say that the order of the 11th of March was an order which, whether the learned Judge had jurisdiction to make it or not, was improperly made *ex parte*, and it indicates to my mind that the persons who made the application did not expect to succeed in it if it were opposed. The general rule of law is that all proceedings affecting the rights of others are only to be taken when those other persons have had an opportunity of being heard. I must say that I cannot see any good or legitimate reasons for making an application to search through a man's private banking account without giving him notice that such an application is about to be made; and it is fortunate that the London and County Bank acted as one would expect that any respectable bank would act, and gave notice to their customer before they allowed his private banking account to be investigated in this way.

On the question of jurisdiction I entertain considerable doubt. I do not suppose that it was the intention of the Legislature to vary the principle of jurisprudence to which I have referred; but the words of section 7 are undoubtedly large, and are, it has been contended, capable of such a construction. The order may be made without summoning the bank or "any other party." Those are vague and ambiguous words, and, but for the definition of "legal proceeding," I should not have hesitated to hold that the words "or any other party" referred, not to any other party to the action, but to any other party that might be deemed to come under the

(1) Bankers' Books Evidence Act, 1879 (42 Vict. c 11). s. 7: "On the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

Section 10: "The expression 'legal proceeding' means any civil or criminal proceeding or enquiry in which evidence is or may be given, and includes an arbitration."

(2) The affidavit in support of the application was made by the plaintiff's solicitor, and stated he was informed by the plaintiff and believed that the defendant, being unable to meet certain bills of the plaintiff's, the bills were, at the request of the defendant, renewed from time to time, and that the plaintiff was in the habit of giving cheques in fictitious names to the defendant for the purpose of taking up the said bills. The affidavit went on to state as follows: "The plaintiff, I believe, did not keep a proper set of books of the transactions between himself and the defendant; therefore the plaintiff requires an inspection of the defendant's banker's books, and a copy or extract of such account. A reference has been fixed, and it will not be safe to proceed without having an inspection and a copy of such bank account, and the same will materially assist the plaintiff."

description of "bank," such as an officer of the bank, an individual banker, or persons of that description. But when I find that "legal proceedings" are to include civil or criminal proceedings, I am induced to think that by the use of those words it was intended to give the Court or Judge power in criminal proceedings to cause the banking accounts of persons charged with crimes to be examined in the same way that search warrants and other warrants are issued to the police authorising them to enquire into persons' private affairs without the consent and without hearing objection on the part of the persons charged, and that the words have been used by those who framed the Act without sufficient thought as to their effect on civil proceedings. It is not, however, necessary for me to express any opinion as to the jurisdiction. One thing I am quite determined about, and that is that, unless it is some such case as I cannot well conceive, the jurisdiction ought never to be exercised *ex parte* in civil cases.

These would be sufficient reasons to justify me in setting aside the order of the 11th, but I now come to the order of the 17th of March, at which both parties were before the learned Judge. I am of opinion that the affidavit on which that order was made was utterly insufficient. It is sworn to by a person who cannot speak from his own knowledge to the matters contained in it, and, in addition to that objection, it is insufficient in its terms, and, in my judgment, shews no cause for any inspection of this banking account. The plaintiff brings his action for goods sold and delivered. The defendant denies his liability, because he says he paid for them. That issue rests on the defendant. The defendant also makes a counterclaim in respect of some pecuniary transactions which he had with the plaintiff, and that issue also rests on the defendant. It may be that the defendant will avail himself of the banker's books upon those issues, and if he does they will be open to the inspection of the other side; but at the present time I do not see that the banker's books have, as regards the parties, anything to do with the matters in issue; at any rate, if they have, they relate exclusively to the defendant's case.

It seems to me that this is what is called a mere fishing application, and I am of opinion that the order of Mr. Justice Field should be set aside, and with costs.

SMITH, J.—I think that the order of Mr. Justice Field should be set aside. In November, 1883, the plaintiff brings an action against the defendant for goods sold and delivered, in which the defendant pleaded payment and set up a counterclaim of some 400*l.*, alleging that he had to take up accommodation acceptances for the plaintiff for that amount. On the 11th of March the plaintiff applied *ex parte* and obtained, on an affidavit which I must say is an extremely loose one, an order from Mr. Justice Field that he should be at liberty to inspect and take copies and extracts from the books of the defendant's bankers. The affidavit is sworn to by the solicitor to the plaintiff, and not by the plaintiff himself. [His Lordship proceeded to criticise the affidavit.] Now what are the issues between the parties? First of all, there is the claim for sale and delivery of goods; then there is the plea of payment, which is on the defendant, and the counterclaim, which is also on the defendant: in none of those issues can the plaintiff require inspection of the defendant's banking account, and yet he wants to make an inspection of the whole of the defendant's account. Had it not been for the fortuitous circumstance that the London and County Bank told their customer, the defendant, he would have known nothing about it. It seems to me to be one of the most oppressive modes of proceeding one can well imagine to say that because one man brings an action against another he is to be entitled to have a full copy of his opponent's banking account, and, for aught I know, keep it in his possession and use it for any other purpose. At any rate, as far as I am concerned, I will not give the plaintiff that opportunity unless I am forced to do so.

It seems to me that in this case my brother Field should not have made the order he did; but I am anxious to point out that the plaintiff went *ex parte* in the first instance. My brother Field had no affidavit of the defendant before him. He had to take the affidavit of the plaintiff's solicitor as true, although, as I have pointed out, there is not sufficient evi-

Davies v. *White.*

dence in it against the defendant. The defendant in his affidavit not only says that what the plaintiff's solicitor states is untrue, but sets out documents shewing that he is at issue with him as to these bills being accommodation acceptances. It seems to me that the order should not have been made, and I think therefore that it must be discharged.

DAY, J.—The effect of our judgment will be that both orders are to be set aside.

Appeal allowed, with costs to defendant in any event.

Solicitors—Saunders, Hawksford & Bennett, for plaintiff; A. G. Ditton, for defendant.

1884. March 31. } WILKINSON AND ANOTHER *v.* COLLYER.

Landlord and Tenant—Agreement by Tenant to pay "all Rates, Taxes and Assessments"—Cost of Paving—Metropolis Management Acts, 18 *&* 19 *Vict. c.* 120. *s.* 105, *and* 25 *&* 26 *Vict. c.* 102. *s.* 96.

The defendant was tenant to the plaintiffs of a house under an agreement for a lease, by which he agreed to pay "all rates, taxes and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax)." The plaintiffs, having been compelled to pay the amount apportioned by the vestry in respect of the said house for the expense of paving the street in which it was situated, now claimed repayment from the defendant under the agreement:—Held, *that this was not a "rate, tax or assessment" from which the defendant by his agreement undertook to relieve the plaintiffs, and that therefore the plaintiffs were not entitled to maintain an action against the defendant in respect of the amount so paid by them.*

Hartley *v.* Hudson (48 Law J. Rep. C.P. 751; Law Rep. 4 C.P. D. 367).

Motion for judgment under Order XXXII. rule 6, on admissions on the pleadings.

Statement of claim.

The plaintiffs claim as landlords of a house known as Gothic Lodge, Rye Hill Park, Peckham, Surrey, against the defendant as tenant thereof under them, for 26*l.* 17*s.* 6*d.* The defendant, by an agreement for lease of the said house, dated the 23rd of October, 1883, and made between the plaintiffs and the defendant, agreed to pay all rates, taxes and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax). The sum claimed is the amount apportioned by the Vestry of St. Giles', Camberwell, in respect of the said premises of the expense of paving the said street called Rye Hill Park. The plaintiffs applied to the defendant to pay this sum, but he refused; the plaintiffs were compelled to pay, and did pay, the said sum.

Particulars.

1884, Feb. 23.—Amount paid to the Vestry of St. Giles', Camberwell, towards cost of paving, as per receipt—26*l.* 17*s.* 0*d.*

Statement of defence.

The defendant admits the several allegations of fact in the statement of claim, and says that the agreement for the lease of the 23rd of October, 1883, was for a tenancy of the premises therein comprised for three years, at the yearly rent of 38*l.*

The defendant says that under the Metropolis Management Acts (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102), the amount apportioned in respect of the said premises of the expense of paving the said street is payable by the plaintiffs as the owners of the said premises, and denies that under the said agreement or otherwise he has contracted or agreed to repay them the amount paid by them.

A. T. Lawrence (*Cock* with him), for the plaintiffs.

H. Terrell, for the defendants.

The following authorities were cited in addition to those referred to in the judgment of the Court—*Tidswell* v. *Whitworth* (1) and *Crosse* v. *Raw* (2).

(1) 36 Law J. Rep. C.P. 103; Law Rep. 2 C.P. 326.

(2) 43 Law J. Rep. Exch. 144; Law Rep. 9 Exch. 209.

Wilkinson v. *Collyer.*

MANISTY, J.—There are numerous decisions bearing on the present point, most of which have been referred to in the arguments; but when one has possession of the facts, there is not much difficulty in respect of the cases. [After stating the facts, his Lordship proceeded as follows:] In order to arrive at the proper conclusion, one must look at the statutes under which the rate is in the first instance levied. The first statute is the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120). Section 105, after authorising the vestry to pave the street, enacts that, "the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses, &c." The next statute is the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), which, by section 96, authorises the vestry "to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act"—namely, 18 & 19 Vict. c. 120—"or this Act, either from the owner or from any person who then or at any time thereafter occupies such premises. . . ." Then follow provisoes allowing the occupier to deduct the amount from his rent, and preserving agreements between landlord and tenant. The payment in the present case being one incurred by the vestry, and by the terms of these statutes payable by the owner, the question arises whether it is such a rate, tax or assessment payable in respect of the premises as the tenant has covenanted to pay.

It is not in terms a rate, or a tax, or an assessment: it is a sum of money incurred by the vestry for paving and improving the street, which the owner is bound to repay them; and if there were no authority against such a conclusion, I should hold that it is not a rate or tax, nor should I hold it to be an assessment—that is, an assessment in respect of a rate or tax. The debt is in the nature of a charge which is of permanent value, and not a temporary rate or tax.

In some cases such a charge might be of large amount, and a tenant who only held from year to year might become liable to the payment, amounting to as large a sum as his rent; but the question in the present case is, has the tenant intended to take upon himself this liability? The cases seem to shew that the Courts do not desire to impose such a liability on the tenant unless he has undertaken it by express words. The case of *Budd* v. *Marshall* (3) was pressed on us as binding and conclusive; but the words of the covenant in that case were different to those in the present. There the tenant covenanted to pay the land tax, sewers rate, borough rate, improvement rate, tithes, and "all other taxes, rates, duties and assessments whatsoever, whether Parliamentary, parochial or otherwise," and the case was in other respects a different one to the present: the drainage having become defective the sanitary authority of the borough served a notice on the owners of the house to abate the nuisance, which they did, and then sought to recover the cost from the tenant under his covenant. It was held that the action was not maintainable, and the *ratio decidendi* of the decision turned upon the meaning of the word "duties." Lord Justice Brett considered that the tenant was not liable under the terms of his covenant, but the majority of the Court (Lord Justice Bramwell and Lord Justice Baggallay) were of a contrary opinion. Lord Justice Bramwell, in dealing with the words in the covenant—namely, "taxes, rates, duties and assessments"—says, "Why should not that include the duty of making good the defective drainage? Why should not the tenant bear the cost? I cannot give an answer which is satisfactory to myself." Lord Justice Baggallay takes the same view. He adverts to the case of *Thompson* v. *Lapworth* (4), in which many more words were used than in the present case, and also *Rawlings* v. *Briggs* (5), in which Mr. Justice Lindley held that a tenant who had covenanted to "pay and discharge all taxes, and all manner of rates, charges, assessments and impositions whatsoever, to be charged, assessed or imposed upon the premises thereby demised, or in respect thereof, or in respect of the said rent, by authority

(3) 50 Law J. Rep. Q.B. 24; Law Rep. 5 C.P. D. 481.

(4) 37 Law J. Rep. C.P. 74; Law Rep. 3 C.P. 149.

(5) 47 Law J. Rep. C.P. 487; Law Rep. 3 C.P. D. 368.

of Parliament, or otherwise howsoever," was not liable to repay to the landlord the amount expended by him in abating a nuisance pursuant to the requirements of a local sanitary authority. Those were large words, but Mr. Justice Lindley considered that they did not include the obligation to repay the landlord the amount expended by him in abating a nuisance pursuant to the requirements of a local sanitary authority. But the same learned Judge (Mr. Justice Lindley) in *Hartley* v. *Hudson* (6) held that a tenant who had covenanted to pay "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises, or upon any person or persons in respect thereof," was liable to repay the landlord the sum apportioned on him by the local board for sewering, levelling, paving, &c., the street in which the house was situate, being of opinion that this was a "charge upon the premises," or "upon any person in respect thereof." In all these cases the words of the covenant were different to the present.

The case of *Allum* v. *Dickinson* (7) supports our view. There the lessee covenanted to pay "all rates and assessments taxed, rated, charged, assessed or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof"; and it was held that the proportion of the expense of paving the new street assessed on the demised house under 25 & 26 Vict. c. 102. s. 96, was not a rate included in the covenant. That case goes a long way towards disposing of this case. There is no case which goes the length of saying that the claim in the present case is a rate, tax or assessment, and I am of opinion it is not within those words, and that therefore the defendant is entitled to our judgment.

WILLIAMS, J.—I am of the same opinion. The question whether the plaintiffs are entitled to maintain this action depends on the intention as expressed by the covenant, and it is, to my mind, immaterial to consider who is primarily liable by statute to pay the cost of paving. These questions generally depend upon the impression produced by the facts of the case and relations of the parties, and I can understand different minds coming to opposite views.

I am content to rest my opinion upon the *dictum* of Mr. Justice Lindley in *Hartley* v. *Hudson* (6), to the effect that the expense of paving can scarcely be said to be a rate, tax or assessment; and, notwithstanding the attempt on the part of the plaintiffs to distinguish *Tidswell* v. *Whitworth* (1), I think that is common ground with the present case. This is a question, not of words but of substance, and in my judgment the plaintiffs are not entitled to recover.

MANISTY, J.—I wish to add to my judgment that, in my opinion, the cost of paving was a statutory debt of the landlord.

Judgment for defendant.

Solicitors—Harries, Wilkinson & Raikes, for plaintiffs; Fitz Payne, for defendant.

(6) 48 Law J. Rep. Q.B. 751; Law Rep. 4 C.P. D. 367.

(7) 52 Law J. Rep. Q.B. 190; Law Rep. 9 Q.B. D. 632.

1884. Feb. 27. } WALKER *v.* THE BRADFORD OLD BANK (LIMITED).

Chose in Action—Assignment—Action by Assignee—Notice after Death of Assignor—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

Under sub-section 6 *of section* 25 *of the Judicature Act*, 1873, *the assignee, by a voluntary assignment, of "all moneys now or hereafter standing to the credit" of the assignor at a bank, may recover from the bank the balance of a current account due to the assignor at his death, and notice of the assignment may be duly given to the bank after the death of the assignor.*

Case stated in an action to recover the sum of 217*l.* 8*s.* 3*d.*, being the amount standing to the credit of Robert Vincent Reynolds, at the time of his death, in the defendant bank.

By an indenture of settlement dated the 1st of March, 1881, Robert Vincent Reynolds assigned to the plaintiff, his

executors, administrators and assigns, absolutely (*inter alia*), "all moneys now or hereafter to be standing to the credit of Robert Vincent Reynolds in the books of or at the bank" of the defendant company, upon trust for Robert Vincent Reynolds during his life, and after his death for his two daughters.

No notice of the assignment was given to the defendants in the lifetime of Robert Vincent Reynolds, but he drew cheques upon his account at the defendants' bank until near the time of his death, and sums of money and orders for money were paid to his credit as usual in the case of an ordinary private banking account.

On the 12th of December, 1882, Robert Vincent Reynolds died, but no letters of administration were taken out nor any will proved.

On the 2nd of February, 1883, the plaintiff gave the defendants notice in writing of the assignment by the indenture already mentioned, and required them to pay to him the money then standing to the credit of Robert Vincent Reynolds.

Wilkinson, for the plaintiff.—The plaintiff is entitled to recover under the 6th sub-section of section 25 of the Judicature Act, 1873, which provides that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." It was held in *Brice* v. *Bannister* (1) and *Buck* v. *Robson* (2) that a future debt may be absolutely assigned within this sub-section.

He also cited *Holroyd* v. *Marshall* (3).

K. Digby, for the defendants.—The assignment of the 1st of March, 1881, was a voluntary assignment which a Court of equity would not have enforced—*Jeffreys* v. *Jeffreys* (4). The debt sued for did not exist at the time of the assignment—*Clements* v. *Matthews* (5) and *In re Compte D'Epineuil* (6). The notice of assignment given after the death of the assignor was too late: the right to the money had passed to the personal representatives.

Wilkinson, in reply, as to the assignment being voluntary, cited *Kekewich* v. *Manning* (7).

Cur. adv. vult.

SMITH, J.—This is an action brought by the plaintiff to recover from the defendants the sum of 217*l.* 8*s.* 3*d.*, being the amount standing to the credit of Robert Vincent Reynolds in their hands at the date of his death on the 12th of December, 1882. The facts are set forth in the Special Case herein, and need not be now repeated.

Three points were raised by the bank (the defendants) in answer to the plaintiff's claim:—

First, they alleged that the assignment of the 1st of March, 1881, under which the plaintiff claimed, was a voluntary assignment, and was not one which a Court of equity would, under all circumstances, have enforced.

Secondly, that at the date of the assignment the 217*l.* 8*s.* 3*d.* was no debt or other legal *chose in action* within the meaning of sub-section 6 of section 25 of the Act.

Thirdly, that the notice of the assign-

(1) 47 Law J. Rep. Q.B. 722; Law Rep. 3 Q.B. D. 569.

(2) 48 Law J. Rep. Q.B. 250; Law Rep. 3 Q.B. D. 686.

(3) 10 H.L. Cas. 191; 33 Law J. Rep. Chanc. 193.

(4) 1 Cr. & Ph. 138.

(5) 52 Law J. Rep. Q.B. 772; Law Rep. 11 Q.B. D. 808.

(6) 51 Law J. Rep. Chanc. 491; Law Rep. 20 Ch. D. 758.

(7) 1 De Gex, M. & G. 176; 21 Law J. Rep. Chanc. 577.

ment not having been given till after the death of the assignor, it was then too late to give it, and that it was therefore ineffectual.

As to the first point, although section 25, sub-section 6, of the Judicature Act, 1873, does not give new rights, but only affords a new mode of enforcing old rights, still I am of opinion that the point now taken will not avail the defendants. The assignment was executed on the 1st of March, 1881; the assignor died on the 12th of December, 1882. No person claiming under the assignment, and no person claiming under the assignor, and, indeed, no person having any interest whatever in the assignment, has ever taken any step to impugn it, and up to the present time it stands valid and unimpeached. I am of opinion that, this being so, it is not competent for a mere stranger to the assignment to successfully raise any point as to whether a Court of equity would or would not enforce it; and I am of opinion, even if the point now taken by the defendants, as to what the Court of equity under the circumstances of the case would or would not do, be correct, that it is not open to the defendants, being mere debtors to the estate of the deceased assignor or to his assignee, now to attempt to impeach the settlement.

Now as to the second point.—It is said that the assignment of the 1st of March, 1881, is not an absolute assignment of any debt or other "legal *chose in action*" within the meaning of section 25, sub-section 6, of the Act, because at the date of the assignment (*a*) the 217*l.* 8*s.* 3*d.* was not an existing debt; (*b*) no right arising out of contract then existed between the assignor and the defendants; (*c*) no legal *chose in action* then existed; and that therefore there was nothing capable of being then assigned. To this I answer that the cases of *Brice* v. *Bannister* (1) and of *Buck* v. *Robson* (2) decide that if an accruing debt arising out of contract be assigned, though not due at the date of the said assignment, such satisfies the provisions of sub-section 6 of section 25 of the Act of 1873. In the present case what has been assigned, to use the words of the indenture of assignment, is, "All moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds (the assignor) in the books of or at the said bank at Bradford aforesaid, called the Bradford Old Bank (Limited)." It was conceded in argument by the defendants that the moneys thereafter paid into the bank to the credit of the assignor were capable of being the subject-matter of contract—*Holroyd* v. *Marshall* (3) and other cases. I am of opinion that, before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the superadded obligation on the bank's part to honour the assignor's cheques, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all moneys then or thereafter standing to his credit. It seems to me, therefore, in this case that at the date of the assignment there was an accruing debt arising out of contract, and consequently that this point also fails the defendants.

As to the third point.—It is said by the defendants that, by sub-section 6 of section 25 of the Act of 1873, the notice to be given to the debtor must be given in the lifetime of the assignor. In the first place, I answer that there is no such limit of time mentioned in the section. It is not stated by whom the notice is to be given; but the effect of not giving it is to let in all equities which may exist or be created prior thereto. It is then said that the legal right to the debt or *chose in action* is only passed to the assignee from the date of the notice, and that therefore the notice must be given in the lifetime of the assignor, for otherwise the legal right would upon his death vest in his personal representative and not pass to the assignee. I do not adopt this contention. In my view the meaning of the sub-section is, until the assignee has given the prescribed notice, he would have to sue as he would have had theretofore to have done; but when the notice is given, then he may bring an action at law in his own name, without being incumbered with having to sue in the name of the assignor, or of having to make him a party to the action.

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I am therefore of opinion that the defendants' points fail, and that the plaintiff is entitled to judgment, and with costs.

My brother Williams agrees in the result of this judgment.

Judgment for plaintiff.

Solicitors—Indermaur & Brown, agents for R. Newton Rhodes, Bradford, for plaintiff; W. F. Atkinson, for defendants.

1884. April 4. DAUBUZ AND ANOTHER *v.* LAVINGTON.

Practice—Order III. rule 6 (F)—Writ—Special Indorsement—Action for Recovery of Land—Landlord and Tenant—Mortgagor and Mortgagee—Attornment Clause.

A mortgage deed contained an attornment clause by which the mortgagor became tenant at will to the mortgagee of the land mortgaged, at a rent identical with the interest secured by the deed. The interest being in arrear, the mortgagee gave notice to quit, and failing to obtain possession brought an action against the mortgagor for the recovery of the land:—Held, *that the action was one "for the recovery of land by a landlord against a tenant whose term has expired" within Order III. rule 6 (F), entitling the plaintiff to indorse the writ specially with a statement of his claim under that rule, and consequently to apply for final judgment under Order XIV.*

Appeal from the order of Field, J., at chambers.

The action was brought by mortgagees against the mortgagor for recovery of land. The mortgage deed contained an attornment clause in the following form:—"Lastly, the said mortgagees, being in possession according to the true intent and meaning of the Bills of Sale Act, 1878, do hereby demise unto the said mortgagor the lands, hereditaments and premises hereinbefore expressed to be hereby granted, and the said mortgagor doth hereby attorn tenant thereof to the said mortgagees at the rent of 360*l.* per annum, being a fair and reasonable rent within the meaning of the said Act, to be paid in advance half-yearly, on the 24th day of June and on the 25th day of December in every year, the first of such payments to be made on or before the execution of these presents, and the next on the said 24th day of June, and so on thenceforth: Provided, nevertheless, that the said mortgagees and the survivors and survivor of them, and the heirs of such survivor, their or his assigns, may at any time after the said 25th of December, 1881, enter into and upon the said lands and hereditaments or any part thereof, and thereby or in any other way they or he may think fit determine the tenancy hereby created without giving to the mortgagor any previous notice to quit; and, further, that nothing hereinbefore contained shall constitute the said mortgagees mortgagees in possession for any other purpose than the making of the above determinable demise, or subject them to any liability to account or other liability incident to the position of mortgagees in possession."

The rent reserved by the demise was identical with the interest secured by the mortgage. The interest being in arrear, the mortgagees served a notice on the mortgagor to quit "forthwith," and that not being complied with, the present action for possession was commenced.

The writ was specially indorsed with a statement of the plaintiffs' claim, as follows:—"The plaintiffs' claim is for possession of the freehold land and hereditaments known as the Twineham Grange Estate," [then followed a description of the premises:] "The above described land and hereditaments were demised by the plaintiffs to the defendant by indenture of the 19th of December, 1881, at the rent there mentioned, subject to a proviso that the plaintiffs might at any time after the 25th of December, 1881, enter into and upon the said lands and hereditaments or any part thereof, and thereby or in any other way they might think fit determine the tenancy thereby created without giving to the defendant any previous notice to quit. The said tenancy of the defendant was duly determined by notice to quit and entry on the said lands and hereditaments on the 8th of February, 1884."

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The plaintiffs then applied under Order XIV. for liberty to sign final judgment for recovery of the land. Field, J., at chambers, held that the mortgagees were landlords and the mortgagor was their tenant, and that the term was duly determined by notice to quit; that consequently the action was within Order III. rule 6 (F) (1); and there being no defence on the merits, the learned Judge gave the plaintiffs leave to enter judgment. Against this decision appeal was now brought.

Scarlett, for the defendant.—The action is not one in which the writ can be specially indorsed under Order III. rule 6 (F), because the relation of mortgagor and mortgagee exists, and not that of landlord and tenant. The object of the attornment clause is only to further secure the payment of interest by enabling the mortgagees to distrain. Clause (F) is intended to apply only in those cases where the relation of landlord and tenant properly and in fact exists. The tenancy has not been determined: the attornment clause entitles the plaintiffs to enter, and they have not taken possession. In *Hobson* v. *Monk* (2), Mathew, J., held that Order XIV. was not intended to apply to such a case as the present.

Reginald Hughes, for the plaintiffs, was not called upon.

Lord Coleridge, C.J.—I am of opinion that the order of Mr. Justice Field should be affirmed. The question for our decision is, whether Order XIV. applies to the present action so as to entitle the plaintiffs to an order for final judgment. The case before us is one of mortgagees against mortgagor; and, as is usually the case, the mortgagor has been allowed to remain in possession, the mortgagees retaining the security of the land. By the deed of mortgage the relation of landlord and tenant has been created; but there may be the two sets of obligations arising between two persons, and so it signifies not that the relation of mortgagor and mortgagee also exists. The relation therefore of landlord and tenant existing, has the tenancy been determined? The tenancy purports to be determined by notice to quit. It is suggested that no notice to quit is necessary, because the relation of mortgagor and mortgagee requires no such notice. That might be true; but either it is a tenancy properly determined by notice, or, if no notice is necessary, it has been determined by the exercise of the mortgagor's will. In many old cases the relation of mortgagor and mortgagee has been assimilated (though there is nothing, as Lord Mansfield once said, more difficult than true assimilation) to that of landlord and tenant. Then why should not this order apply? It is just and convenient it should apply. No defence to the action on the merits has been put forward, and there is no reason against the application of Order XIV. that I can see, except that the mortgagor should put the mortgagees to the trouble of bringing an action in the longer mode instead of this shorter proceeding.

For these reasons I am of opinion that the relation of landlord and tenant has been accurately described within the true meaning of Order III. rule 6 (F), and the writ therefore becomes one enforceable under the provisions of Order XIV.

Cave, J.—I am of the same opinion. To the relation of mortgagor and mortgagee has been superadded the relation of landlord and tenant. I see no reason why that should not be done; it has been done for a long series of years, as a means of giving the mortgagee a better remedy.

I am clearly of opinion that the parties in the present case stand towards each other in the relation of landlord and tenant. Has, then, the tenancy expired? I agree with my Lord that either the tenancy has been determined by the notice which has been given, or if notice to quit was unnecessary, then it has been deter-

(1) Order III. rule 6 (F): "In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ or summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in Appendix C, section 4, as shall be applicable to the case."

(2) Law J. Weekly Notes, 1884, p. 73.

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mined by the will of the landlord. I am of opinion, therefore, that the action is within Order III. rule 6 (F), and that under the circumstances the plaintiffs are entitled to an order for final judgment under Order XIV.

Judgment for the plaintiffs.

Solicitors — Hughes, Masterman & Rew, for plaintiffs; Frank Cherry, for defendant.

[IN THE COURT OF APPEAL.]

1884. March 29, 31. WHALLEY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.*

Flood—Excessive Rainfall—Accumulation of Water on Land—Right to send Water on to Neighbour's Land—Liability for Damage so caused—Servitude.

Owing to an excessive rainfall a quantity of water accumulated on the upper side of the defendants' railway embankment, which crossed some sloping land. They, finding that the pressure of water was causing danger to their embankment, cut trenches through the embankment, and thereby caused the water to flow through and on to the land of the plaintiff, which lay at a lower level on the lower side of the embankment. The jury found that the defendants had acted reasonably, regard being had to the safety of their own property, and that there was no negligence.

In an action for damages for the injury thus caused to the land of the plaintiff,—

Held, *that the defendants were liable, for that what they had done was not to ward off a common danger, but to transfer to the land of the plaintiff the danger and mischief already existing on their own land.*

Appeal from the judgment of Day, J., on further consideration.

Action for damages for injury caused to the land of the plaintiff by a flood of water.

The plaintiff was the occupier of land lying on one side of, though not immediately adjoining to, the railway of the defendants. The defendants' railway was carried along an embankment across land which sloped down towards the land occupied by the plaintiff, so that the land of the plaintiff lay at a lower level than the land on the other side of the railway embankment. In August, 1881, there was a great fall of rain, owing to which a small stream near the embankment overflowed, and a large quantity of water accumulated on the upper side of the embankment. The rainfall was so extraordinary and excessive that the weight of water which thus accumulated endangered the embankment of the railway company, and, in order to prevent this embankment from being injured, the defendants cut trenches through the embankment, and thus caused the water to pass through these cuttings over some intervening land on to the land of the plaintiff, causing damage to his crops, and for the injury so caused the action was brought, 196*l.* being claimed as damages. The jury found that the defendants cut the trenches and caused the flood-water to flow over the land of the plaintiff, that the cutting of the trenches was reasonably necessary for the protection of their property, that there was no negligence, and found a verdict for the plaintiff, with 120*l.* damages (1).

Day, J., gave judgment for the plaintiff.

The defendants appealed.

Russell, Q.C., and *R. H. Collins, Q.C.*, for the appellants.—The defendants have not been negligent, and as they had an embankment which they were authorised to make, they were entitled to take all reasonable measures for its protection. In this case the flood was in fact not on the land of the defendants, although it collected against their embankment; but if

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

(1) The jury considered that some damage would have been caused in any event, and as the amount of damage proved was not contradicted, the jury deducted 76*l.*, and gave a sum which in their opinion represented the extra damage caused by the act of the defendants in cutting the trenches

it is to be considered as being on their land, then it came on to their land without any act of theirs: so that they are not in the same position as persons who bring water on to their land, they merely got rid of the water which had come there against their will. What they did was done for the protection of their land: they did, in fact, but ward off a common enemy; and unless some servitude has been imposed on the defendants which entitles the plaintiff to call on them to retain this flood upon their land, then the defendants are not liable to the plaintiff for the injury caused by their doing an act which caused the water to pass on from their own land to that of the plaintiff.

[BRETT, M.R.—But had the defendants a right to save their own property by causing injury to the land of their neighbour? Was there any common enemy in this case: were not the defendants sufferers, and have they not transferred the injury from their property to that of the plaintiff? Was not the only common danger that which existed before the water came on to the land of the defendants? There is no finding that if the defendants had done nothing their embankment would have been swept away, and injury thus caused to the plaintiff.]

All that the defendants did was to use their property in the ordinary way; what was done in *Smith* v. *Kenrick* (2) was held justifiable because it was done in the ordinary way of business and to enable the defendant to work his property, and what the defendants did here was for the protection of their property, for they only used their property in the best way according to the natural user of such property, and even if prejudice accrued to the owner of adjoining land, still they are not liable for that.

In *Baird* v. *Williamson* (3) it was held that the owner of a mine at a higher level than an adjoining mine is not liable for water which flowed by the force of gravity into an adjoining mine; and that applies to this case, for the defendants did not pump it out, they only allowed the water to flow in the direction in which the force of gravity naturally sent it. To the same effect is the decision in *Rylands* v. *Fletcher* (4), for there was here an accumulation of water on the surface which, by the laws of nature, passed off on to the plaintiff's land, and it was not the business of the defendants to protect the plaintiff against this. The defendants here are in the same position as that suggested by Gould, J., in *Scott* v. *Shepherd* (5), where he said that if a squib be thrown into a carriage full of company the person throwing it out again would not be answerable for the consequences. *The Queen* v. *Pagham* (6) and *Nield* v. *The London and North Western Railway Company* (7) shew that a man may ward off a common enemy without being responsible to his neighbour for the consequences; and in *Menzies* v. *Breadalbane* (8) it was held that in the case of a flood persons may, even to the prejudice of their neighbours, for the sake of self-preservation, guard themselves against the consequences of the flood.

Gully, *Q.C.*, and *Part*, for the plaintiff.—The first part of the finding of the jury renders the defendants liable, and the finding that they acted reasonably with regard to their own interests does not relieve them from that liability. They first penned the water back on their own land, and then they let it out on to the land of the plaintiff. *Smith* v. *Kenrick* (2) and other cases relating to mines do not establish the proposition contended for by the defendants; and, further, the decisions on subterranean rights do not apply to surface rights: the principles to be applied are different—*Crompton* v. *Lea* (9) and *Hurdman* v. *The North Eastern Railway Company* (10). If a man has a natural pond on his land, and owing to an excessive rainfall it becomes dangerous to his own property, he cannot let it off in a time of flood on to his neigh-

(2) 7 Com. B. Rep. 515; 18 Law J. Rep. C.P. 172.

(3) 15 Com. B. Rep. N.S. 376; 33 Law J. Rep. C.P. 101.

(4) 37 Law J. Rep. Exch. 161; Law Rep. H.L. 3 E. & I. App. 330.

(5) 1 Sm. L.C. (8th ed.) 466, at p. 473.

(6) 8 B. & C. 355.

(7) 44 Law J. Rep. Exch. 15; Law Rep. 10 Exch. 4.

(8) 3 Bligh, N.S. 414, at p. 420.

(9) 44 Law J. Rep. Chanc. 69; Law Rep. 19 Eq. 115, at p. 126.

(10) 47 Law J. Rep. C.P. 368; Law Rep. 3 C.P. D. 168.

bour's land; and the statutory authority under which the defendants made their embankment does not put them in any better position. Cases such as *The Queen* v. *Pagham* (6) and *Nield* v. *The London and North Western Railway Company* (7) do not apply, for there was not in this case any common danger; and in those cases the defendants were not bound to accept the danger which threatened them, but they were entitled to ward it off, and if, in so protecting themselves, injury was caused to other persons, they were not liable. *Menzies* v. *Breadalbane* (8) was decided on Scotch law; but it was said in that case that, according to English law, a person cannot make an embankment which will have the effect of throwing the flood streams of a river on to his neighbour's land, and in that case the defendant was restrained from erecting an embankment which would have that effect.

In this case the defendants are liable, because they, having a nuisance on their land, and there being no common danger, so acted as necessarily to throw the nuisance on to the land of the plaintiff.

Collins, Q.C., in reply.

BRETT, M.R.—The defendants to this action own a railway which runs upon an embankment, and they also own the embankment, which they constructed upon land taken by them in pursuance of the authority conferred upon them by statute. This embankment was constructed upon sloping land, so that the land upon one side of it lay higher than that on the other side. There came an extraordinary storm of rain, which caused a flood upon the upper side of the embankment, so that a body of water rested against the embankment, causing danger to the embankment. In these circumstances the defendants cut some trenches through the embankment, the necessary effect of which was to let the water which had thus collected pass through the embankment on to the land of the plaintiff which lay on the lower side, and that in a different way from that in which it would have passed by percolation, always supposing that it would so have percolated; and the consequence was that this water caused damage to the land of the plaintiff, which lay on the lower side of, though not immediately adjoining to, the railway embankment. The question is whether the defendants are liable. The jury have in effect found that the water did more damage than it would have done had it percolated through the embankment; but they also found that what the defendants did was reasonable, regard being had to their own interest and to the preservation of their own property, and that what they did was not negligently done. Had the defendants, then, a right thus to get rid of the misfortune which had come upon them, and were they entitled to take such active means which, though reasonable for the preservation of their own property, must of necessity have the effect of causing injury to the property of their neighbour?

Several cases have been cited from which it has been attempted to extract the principle which we ought to apply to this case. In some of those cases the circumstances are such that there is property so placed that it must of necessity be injured if the neighbouring owner uses his property at all in the ordinary way in which in the course of nature the property would be used, and in such a case that property must, I think, be considered to be in nature subject to a defect: and that seems to me to be so in the case of those mines where one mine is situated lower than the other, and so that the upper mine cannot be worked in the ordinary way without necessarily injuring the lower mine; for then such a mine must be considered to be subject to a defect—that is, the owner of the lower mine cannot prevent his neighbour from using his mine in the ordinary way in which mines are used, for that would be to attempt to transfer the defect from the one property to the other, and the law does not allow that to be done.

There are cases in which property is so situated that unless the owner prevents an injury from happening to his property which the ordinary course of nature would bring upon his property, the property must suffer injury, according to the ordinary course of nature, from its position. Such a case is like the case of *Menzies* v. *Breadalbane* (8); and if in such a case the owner of the land does something on his own land to cure that natural defect, and thereby

attempts to transfer that defect to a neighbour's land, it seems to me that the law does not permit him so to alter the course of nature, as he cannot do so without causing injury to his neighbour. I think that both these classes of cases really depend upon a similar principle—and that is, that a man cannot be permitted to cure a defect which exists by nature in the position of his own land by transferring it to the land of his neighbour.

Another class of cases is that in which an extraordinary danger threatens a man and his neighbour, or, it may be, threatens the first-named alone. In such a case a man can defend himself from it before it occurs: he can take precautions to protect himself from it; but the danger is then so far common that it affects his neighbour as well. It is said that in such a case a man may prevent the danger from affecting him, and that if the necessary consequence of his doing so is that the danger happens to some one else, then no liability rests upon the person who so acts, and that he is not answerable for the injury so caused. The cases of *The Queen* v. *Pagham* (6) and *Nield* v. *The London and North-Western Railway Company* (7) seem to fall within this class.

Again, there are cases in which there is something which being in existence causes an injury to the property of a man, and the question arises whether in such cases a man can do an act in order to get rid of that injury and to cure the mischief, when that act transfers the injury to and causes mischief to his neighbour. If a man has himself brought that upon his land which may cause danger, then he is, being in such a position, liable, even though he does no second act and does not do that which actually and immediately causes the mischief; still, he in fact causes mischief to his neighbour, and then he is liable, as in the case of water brought by him artificially on his land, which he does not let out, but which bursts out; because in this case he has himself brought the water on to his land, and so, even though no damage is caused till the occurrence of the second act, which he does not do, still he is liable for the injury caused by that water to his neighbour. But it is urged that the present case is to be distinguished from that case; and it is suggested that if a man has not himself brought the danger on to his land, he is not liable for the injury caused by it. That may be true if he does nothing which causes it to pass on to his neighbour, for then, though both suffer from the extraordinary danger, still the man on whom it first falls is not liable to his neighbour.

Taking, then, the case of a danger coming on to a man's land, but not brought on by him: the mischief is done to his property, but his neighbour is safe. Can he, then, do something which will transfer this danger and this misfortune to his neighbour? I think that to assert that a man can so act would be to contravene the principle that a man must use his own property so as not to cause injury to his neighbour: for where there is a choice of courses a man cannot elect to adopt that course which endangers his neighbour. The case now before us is complicated by this—that there was danger to the embankment from the flood, and it is said that the water would in any case have got through the embankment on to the land of the plaintiff; but it is also in effect found that if the water had percolated through the embankment in the ordinary way, it would not have caused as much injury as was caused by its passing through these cuttings made by the defendants. The defendants, therefore, have preserved their property by transferring the misfortune to their neighbour, the plaintiff; and they are in consequence liable.

It is then urged that they ought not to be held liable, as they used the railway in the way in which a railway naturally would be used, and therefore that the plaintiff was the owner of land with a defect, as it was land situate near to a railway which was being used in the ordinary way in which railways are used. That contention is true with regard to injury caused to fields, flowers, fruit and crops by sparks from a duly constructed locomotive, when there is no negligence; but I think it is not possible to say that to cut trenches through an embankment is the ordinary use of a railway embankment.

I think that this appeal must be dismissed, for that this case falls within the

principle that an extraordinary misfortune has happened, that it fell on the defendants, and that if they had allowed things to be as they were they would have been the sufferers; but, instead of that, they tried to get rid of the misfortune which, *rebus sic stantibus*, would have caused no injury to the plaintiff, and they did something which caused injury to him, so that they are liable in this action. I would add that I do not incline to adopt the distinction which has been suggested between what is done above and what is done below ground.

Further, I think that the case put by Mr. Justice Gould in *Scott* v. *Shepherd* (5) can only be upheld on the ground that a squib is dangerous to every one, and because the squib never was really in the possession of the person who was in the coach, and that what he did in that suggested case was to prevent it from coming into his possession, for if it had been in his possession I should be unable to agree with the opinion expressed by Mr. Justice Gould as to the liability of the person in the coach in that case.

BAGGALLAY, L.J.—I agree with the principles laid down by the Master of the Rolls as extracted from the various cases cited, and I do not desire to add anything to them. In this case they have to be applied to certain facts, and one of those facts is, that the defendants did not prevent the water from flowing on to their own land, but that it was actually on their land, and that being the case, then if they caused it to pass on to a neighbour's land they, by doing so, relieved themselves from the danger caused by it to themselves. If they had left it alone and had not cut the trenches, then the plaintiff would not have had any remedy against them; but if they did something which caused it to pass on, then they must take the risk of the consequences which resulted, and this even though it was reasonable for them so to act, regard being had to their own interest; and as their act did, in fact, cause injury to their neighbour, they must be held liable, for when once the facts are ascertained, the principle to be applied is clear.

LINDLEY, L.J.—The defendants made this embankment, and against this embankment a quantity of water collected to such an extent as to cause danger and to make it reasonable that the defendants should attempt to get rid of it. But no authority can be found which lays down that the defendants are not liable to the plaintiff for the damage caused by their act. It has been argued that certain cases which were decided in connection with the working of mines shew that the defendants are not liable; but I agree with the Master of the Rolls that those cases do not establish that position, and as Lord Justice Cotton said in *Hurdman* v. *The North Eastern Railway Company* (10), "excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle—that the owner of land holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land."

The circumstances of this case do not make it analogous to the cases of mines. It may be said to be more like the case of *Nield* v. *The London and North Western Railway Company* (7). In that case it was established that a person who sees a flood coming may fence his land so as to keep it off and turn it away, and then that he is not responsible for the consequences which may follow upon what he does for that purpose. The case of *The Queen* v. *Pagham* (6) goes a step further in the same direction; but the difference between those cases and the one now before the Court is, that the action taken in them was action taken to protect persons from a danger which had not yet occurred. The case of *Scott* v. *Shepherd* (5) comes perhaps nearer in principle to this case; but that decision turned in great measure

on the form of action which ought to be adopted, and now mere forms of action are not material. Here the question is, whether a landowner on to whose land there has come a large accumulation of water can turn it off on to the land of a neighbour and thus save himself from danger and damage. It appears to me that the law as to the general rights and duties of landowners do not favour such a view, and I agree that the judgment of Mr. Justice Day must be affirmed.

Appeal dismissed.

Solicitors—Gregory, Rowcliffes & Co., agents for Woodcock & Walmesley, Wigan, for plaintiff; Clarke, Woodcock & Ryland, agents for C. Moorhouse, Manchester, for defendants.

[IN THE HOUSE OF LORDS.]

1883. Nov. 29, 30. 1884. March 10.

THE MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* KENT.

Building Society—Mortgage—Arbitration—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 16, *sub-s.* 9, *ss.* 34, 35 *and* 36—*Jurisdiction of High Court.*

A building society formed under the Building Societies Act, 1874, *and having in accordance with section* 16, *sub-section* 9, *a rule requiring all disputes between itself and its members to be settled by arbitration, sued an advanced member upon covenants contained in a mortgage. On a summons taken out by the member to stay proceedings*,—Held (*by* LORD BLACKBURN *and* LORD WATSON; *dissentiente the* EARL OF SELBORNE, L.C.), *that the jurisdiction of the Court was ousted, and that the matter must be referred to arbitration under the rule.*

This was an appeal from a judgment of the Court of Appeal dated the 17th of April, 1883, affirming an order of the Queen's Bench Division dated the 10th of February, 1883.

The appellants (plaintiffs below) were a permanent benefit building society, formed and registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42).

By indenture dated the 31st of December, 1878, and made between the respondent (defendant below) of the first part and the appellants of the second part, after reciting that certain premises therein described became vested in the respondent for the residue of a term of ninety-nine years, and after reciting that the respondent had subscribed for fifty-six shares in the appellant society, and had applied to the appellants to advance him 500*l.* in respect of such shares, and had offered to pay a premium for such advance of 60*l.* to be added to and treated as part of the principal sum advanced, and had agreed to repay such principal sum by 144 monthly advance instalments of 5*l.* 5*s.* 5*d.* each, extending over a period of twelve years computed from the 31st of December, 1878, the first of such instalments to become due and to be paid on the execution thereof, and the remainder respectively on the first day of every month during the said period commencing with the 1st of January then next, and that the appellants had agreed to lend such sum, it was witnessed that, in pursuance of the said agreement and in consideration of the said sum of 500*l.* paid to the respondent out of the funds of the appellants, the respondent covenanted that he would pay to the appellants all advance instalments, fines and other moneys (if any) which, according to the said agreement and to the rules of the appellants, should become payable in respect of the said fifty-six shares, and would duly observe the rules of the appellants; and by the said indenture the respondent demised to the appellants the said premises, subject to a proviso for vacating the said indenture upon the respondent paying all advances, instalments, fines and other money according to the said agreement and rules, and performing the rules and the covenants therein contained.

By indenture of further charge, dated the 19th of March, 1879, and made between the respondent of the one part and the appellants of the other part, in consideration of a further advance of 100*l.* made by the appellants to the respondent, the respondent subscribed to further shares in the appellant society, and covenanted to

repay to the appellants the said sum of 100*l.*, together with a premium of 12*l.* and interest upon the said principal sum and premium, in 144 monthly equal advance instalments of 1*l.* 1*s.* 1*d.* each, upon the same terms, covenants and conditions as were contained in the indenture of the 31st of December, 1878, hereinbefore recited.

The appellants subsequently entered into possession of the said demised premises, and on the 14th of June, 1882, commenced this action in the Queen's Bench Division for the recovery of instalments alleged by them to be due in respect of the said indentures of mortgage and further charge, amounting in the whole to 88*l.* 11*s.* The appellants further in the said action sought to recover from the respondent 29*l.* 15*s.* for fines, 3*l.* 3*s.* for premiums of insurance paid by the appellants for the respondent, 20*l.* 10*s.* 10*d.* for ground rent, and 33*l.* for repairs done to the said demised premises by the appellants. The total amount of the said several sums was 174*l.* 19*s.* 10*d.*; the appellants gave the respondent credit for 28*l.* 6*s.* 6*d.* received by them as mortgagees in possession: the net balance sued for being therefore 146*l.* 13*s.* 4*d.*

The respondent by his statement of defence put the appellants to the proof of the indenture of the 31st of December, 1878, and the 19th of March, 1879, and denied his liability for the several sums claimed by the appellants, and disputed the appellants' right to go into possession of the demised premises. He further alleged that he had offered before any of the said alleged liabilities became due to pay off the whole of the advances made to him, but that the appellants had refused to accept the same or to take the necessary steps for revesting in him the said demised premises.

The respondent also counter-claimed for damages occasioned by the appellants taking possession of the said demised premises, and for their alleged negligence as mortgagees in possession.

The respondent on the 18th of January, 1883, applied by summons that the action might be stayed on the ground that the Court had no jurisdiction to try the same.

The said summons was referred by the Master to the Judge in chambers, Hawkins, J., and by the Judge to the Divisional Court of the High Court of Justice.

The Divisional Court made the said order of the 10th of February, 1883, subsequently affirmed by the Court of Appeal, by which all proceedings in the action were stayed, upon the ground that this was a dispute between the society and one of its members, within the meaning of section 16, sub-section 9, of the Building Societies Act, 1874, and that by rule 49 of the appellants' rules provision was made for the settling of such disputes by arbitration, and that when such provision was made by the rules of a building society, section 34 of the Building Societies Act, 1874, provided in what manner such disputes should be settled. That therefore the jurisdiction of the High Court of Justice was ousted, and that no such action could be sustained.

The following are the material sections of the Building Societies Act, 1874:—

37 & 38 Vict. c. 42. section 16: "The rules of every society hereafter established under this Act shall set forth,—"

. . . . . .

Sub-section 9: "Whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court, or to the registrar, or to arbitration."

Section 34: "Where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and elected in the manner such rules provide, or, if there be no such provision, at the first general meeting of the society, none of the said arbitrators being beneficially interested, directly or indirectly, in its funds; of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute, the number of the said arbitrators and mode of ballot being determined by the rules of the society; the names of such arbitrators shall be duly entered in the minute-book of the society, and, in case of the death or refusal or neglect of any of the said arbitrators to act, the society, at a general meeting, shall name and elect an arbitrator to act in the place of the arbitrator dying or refusing or neglecting to act; and whatever award shall be made

by the arbitrators or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same upon the petition of any person concerned. Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators."

Section 35: "The Court may hear and determine a dispute in the following cases:—

"1. If it shall appear to the Court, upon the petition of any person concerned, that application has been made by either party to the dispute to the other party, for the purpose of having the dispute settled by arbitration under the rules of the society, and that such application has not within forty days been complied with, or that the arbitrators have refused or for a period of twenty-one days have neglected to make any award:

"2. Where the rules of the society direct disputes to be referred to the Court or to Justices."

Section 36: "Every determination by arbitrators or by the Court or by the registrar under this Act of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of law, or restrained or restrainable by the injunction of any Court of equity: Provided always, that the arbitrators or the registrar or the Court, as the case may be, may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law, and shall have power to grant to either party to the dispute such discovery as to documents and otherwise as might now be granted by any Court of law or equity, such discovery to be made on behalf of the society by such officer of the society as the arbitrators, registrar or Court may determine."

The 49th and other material rules of the society are, so far as is necessary, stated in the Lord Chancellor's judgment.

Davey, Q.C., and *T. Terrell* (*H. Terrell* with them), for the appellants.—The question is, whether the decision in *Mulkern* v. *Lord* (1) applies to the arbitration clause in the Building Societies Act, 1874. The Court of Appeal followed their own decision in *Hack* v. *The London Provident Building Society* (2), and this is in effect an appeal from that authority.

The appellants contend that section 16, sub-section 9, of the Building Societies Act, 1874, applies only to disputes between the society and its members as such, not to disputes between them *qua* mortgagor and mortgagee. *Pugh* v. *Heath* (3) decides that a decree of foreclosure effects a conveyance of an equitable estate. But can an arbitrator convey an estate? The Legislature has not expressly authorised him to do so. The inference is that arbitration does not apply to disputes between mortgagor and mortgagee. The old Building Societies Act (6 & 7 Will. 4. c. 32) incorporated the arbitration clause in the Friendly Societies Act (10 Geo. 4. c. 56), s. 27, which was in the widest terms, yet it was held not to apply to disputes between mortgagor and mortgagee, as not being disputes between the society and its members as such—*Fleming* v. *Self* (4) and *Mulkern* v. *Lord* (1). The argument upon which the decisions in those cases went—namely, that there the arbitrator had no special powers for working out a mortgage award—is just as applicable here. The only additional power given by the Act of 1874 is the power to enforce discovery.

It has been said that the present dispute, though between mortgagor and mortgagee, is a mere money dispute, requiring no special powers for dealing with it. But

(1) 48 Law J. Rep. Chanc. 745; Law Rep. 4 App. Cas. 182.

(2) 52 Law J. Rep. Chanc. 541; Law Rep. 23 Ch. D. 103.

(3) 51 Law J. Rep. Q.B. 367; Law Rep. 7 App. Cas. 235.

(4) Kay, 518; 3 De Gex, M. & G. 997; 24 Law J. Rep. Chanc. 29.

in similar cases under the previous Act it was held that the arbitration clause did not apply—*Morrison* v. *Glover* (5), *Farmer* v. *Giles* (6) and *The Queen* v. *Trafford* (7). The principle should be adhered to that the clause only applies to disputes between the society and its members as such. It cannot be intended that collateral disputes should be referred in all cases. And if not, it ought not to be applied between the society and the advanced members, mere nominal members, who take shares only as qualification for an advance, who have no share in the profits and losses of the society, and who cease to be members as soon as they repay their loans.

The Solicitor-General (*Sir F. Herschell*), and *Willis, Q.C.* (*Tindal Atkinson* and *E. B. Calvert* with them), for the respondent.—The case of *Wright* v. *The Monarch Investment Building Society* (8) was cited to the House in *Mulkern* v. *Lord* (1), but was not noticed in the judgments because not applicable, the new Act being seen to be different. As to the object of rules providing for arbitration see *Reeves* v. *White* (9), *per* Lord Campbell.

This is a dispute between the society as such and a member as such—that is, it arises out of a relationship established under the rules of the society. This view is consistent with *Morrison* v. *Glover* (5), *Mulkern* v. *Lord* (1) and *Farmer* v. *Giles* (6). Those cases were all under the old Act, which incorporated so far as applicable an arbitration clause, which referred not to building societies but to friendly societies. It was held that the arbitration clause was not applicable to disputes between mortgagor and mortgagee, such disputes not being liable to arise in the case of friendly societies, and not being within the purview of the clause. Here the clause was expressly drawn for building societies, and must have contemplated disputes about mortgages. As to the want of special powers to enforce the award, the assistance of the County Court may be obtained—sections 34 and 35; and by section 36 there is power to state a case for the opinion of the Supreme Court.

Davey, Q.C., in reply.

Cur. adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE).—I have the misfortune in this case to differ from the rest of your Lordships who heard the argument; and I have doubted whether it might not be best for me to abstain from stating publicly the reasons for the opinion which I have formed, since your Lordships, after considering them, have not found them satisfactory. But, inasmuch as the question is one of very great general importance to all these societies, whose welfare and due regulation are matters of public concern, and as it is possible that the operation of the laws relating to them may at some future time be found again to require attention from the Legislature, I think that, upon the whole, I shall best discharge my duty by stating what my judgment would be upon this question if the power of judgment rested with me.

It has been determined in the Court below, that a provision in the rules of a benefit building society governed by the statute 37 & 38 Vict. c. 42, for the settlement by arbitration of disputes between the society and any of its members or their legal representatives, takes away the jurisdiction of the High Court to entertain an action by the society against one of its members for moneys due to it under covenants in mortgage deeds executed by the defendant to the society.

The object of the society, as stated in its second rule, was to raise, by the subscriptions of its members, a stock or fund for making advances to members out of its funds, upon security of freehold, copyhold or leasehold estate, by way of mortgage; with power, "so far as necessary for the said purpose," to hold land, with the right of foreclosure, and to raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and to repay such funds when no longer required for the purposes of the society. A

(5) 4 Exch. Rep. 430; 19 Law J. Rep. Exch. 20.

(6) 5 Hurl. & N. 753; 30 Law J. Rep. Exch. 65.

(7) 4 E. & B. 122; 24 Law J. Rep. M.C. 20.

(8) 46 Law J. Rep. Chanc. 649; Law Rep. 5 Ch. D. 726.

(9) 17 Q.B. Rep. 995; 21 Law J. Rep. Q.B. 169.

proviso was added, that "any land, to which the society might become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption," should, as soon as conveniently might be, be sold.

There were to be two kinds of "ordinary shares"—fully paid, and subscription shares—both of the nominal amount of 10*l.* The subscription shares were to be paid up by instalments of 1*s.* per month per share; and at the end of each year interest at five per cent. per annum was to be credited upon them, provided the instalments due had been regularly paid. On reaching the amount of 10*l.* they were to become fully paid shares, with all the advantages of such shares. There was also power for the directors to issue preference shares.

Members were to be at liberty, on certain terms specified in rule 5, to withdraw the amount standing to their credit in the books of the society; and also, in the manner specified in rule 6, to transfer their shares.

The 7th rule authorised the society to receive deposits or loans from its members or other persons, subject to a limit of the amount to be at any time due in respect of such deposits or loans to "two thirds of the amount for the time being secured to the society by mortgages from its members."

The 22nd rule regulated the law costs payable by borrowers on the security of freehold or leasehold property, when all business might be transacted in town. The 23rd provided for the survey of properties offered to the society, and for the fees in respect of such surveys, to be paid by the applicants for advances.

Rule 29 provided for certain fines and forfeitures on advanced shares; and rules 32 to 34 inclusive related to the terms on which advances might be made.

Rule 35 provided that any member receiving an advance should execute a mortgage to the society to secure his future payments, "which mortgage should contain all such covenants and provisions as the solicitor might advise"; and that, on the satisfaction of all claims of the society upon any property mortgaged, a receipt in a specified form should be indorsed upon the mortgage at the expense of the mortgagor.

The effect of the eight following rules (36 to 43 inclusive) is, that a member who had obtained an advance might, if he pleased, sell the mortgaged property, and the purchaser might take it subject to the mortgage, and thereupon should become liable for the payment of all advance repayments in arrear, and all fines then due thereon, as well as for all future advance repayments and fines thereon from time to time falling due in respect of such mortgaged property. If the sanction of the board were given to the transfer the vendor was to become entitled to a release from the society. For every payment in arrear the borrower in default was to be chargeable with a fine of one penny per share per month, and, if the arrear should continue for three consecutive months the directors might enter into possession and sell the mortgaged property or collect the rents, and reimburse the society, and, after paying all expenses, hand over the balance, if any, to the defaulting member. If incomplete works on any mortgaged premises should not be proceeded with in a manner satisfactory to the society, the directors might complete them, adding the cost to the amount due on the mortgage. All such property was to be insured by the society, and the member on whose account the premiums should be paid was, on demand, to refund the amount, or it might be deducted from any of his payments; and provision was made for the application of the insurance moneys which the society might receive in case of fire. The 43rd rule is in these words:—"Any member desirous of redeeming the security held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines and interest, and also the present value of the future repayments as ascertained by reference to the tables. All expenses incurred upon every sale, exchange or redemption of any property shall be borne and paid by the member." The 47th rule empowered the society, on the sale of property mortgaged to them by a member, if such member were dead intestate leaving an infant heir, to pay any surplus proceeds of the sale, not exceeding 100*l.*, to the legal personal representative of the deceased member as part of his personal estate. There were

tables shewing the rates of repayment for various terms of years, with power for the society to vary them; and there were rules, of the kind common in such societies, providing for the appointment, duties and removal of directors and other officers, for the meetings of members, and generally for the management of the affairs of the society.

The 49th rule, as to arbitration, is as follows:—"In case of dispute arising between the society and any members thereof, or the legal representatives of any member, it shall be settled by arbitration. Arbitrators shall be elected by the board, none of them (directly or indirectly) beneficially interested in the society; and, in case of reference to arbitration, the names of all the arbitrators shall be written on separate pieces of paper and placed in a box; and the three whose names are first drawn by the complaining party, or some one delegated by him or her, shall be the arbitrators to decide the matter in dispute; and their decision shall be final."

On a review it will be seen—first, that although raising a fund for making advances to members was the purpose for which the society was established, it was not to consist of advanced members only; secondly, that many matters unconnected with mortgages are regulated by the rules, as between the society and its members (advanced or unadvanced), out of which disputes might from time to time arise; thirdly, that many matters connected with mortgages from advanced members, which are also so regulated, are in the nature of conditions of advances, as between advanced members and the society, and independent of the legal and equitable relations of mortgagor and mortgagee, as constituted by deed; and, fourthly, that the securities contemplated by the rules are mortgages in the proper and legal sense of that term—that is, mortgages by deeds, to be executed on each particular occasion, containing such covenants and other provisions as the solicitors of the society should think adapted to the circumstances of each case, the terms of which the rules do not in any case prescribe; mortgages, subject to the usual equitable rights of foreclosure by the mortgagees and redemption by the mortgagors, and the equity of redemption of which the mortgagees might, without any consent, transfer to purchasers not members of the society. That the word "foreclosure" is used in the second rule in its legal and proper sense seems evident from the fact that it is there distinguished from "surrender, or other extinguishment of the right of redemption."

If I had to construe the arbitration clause in these rules, without reference to any statute or other authority, it would certainly appear to me to have reference to disputes under the rules between members (in that character) or their representatives, in respect of their rights or liabilities as such, and the society, and not to questions arising out of covenants or special stipulations in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract, though of a nature contemplated and authorised by it; nor to any questions between the society as mortgagee, and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee. All the authorities decided under the statute which regulated societies of this kind before 1874 are in accordance with that view. *Morrison* v. *Glover* (5) was so decided, on the broad ground that a question arising out of breaches of contract in a mortgage deed executed to a building society by one of its members was a dispute "not between the society and the defendant as a member of the society, but between them as mortgagor and mortgagee." "If" (said the Lord Chief Baron) "any other rule be established than this, that matters in difference between the society and its members, in the character of members, can alone be referred to arbitration: if we go one step beyond that, then extraneous matters of any kind which may happen to be in dispute between the society and any of its members cught to be the subject of a reference. It appears to us, therefore, that the words 'matters in dispute' must be read, matters in dispute between the society and its members as members, and not in any other capacity." The decisions in *Fleming* v. *Self* (4), *The Queen* v. *Trafford* (7) and *Farmer* v. *Giles* (6) are to the same effect, as is also the judgment of this

House in *Mulkern* v. *Lord* (1). It is true that in some of those cases some of the learned Judges or Lords fortified their conclusions by pointing out the unsuitableness and inadequacy of the means of enforcing an award through an order of Justices (the remedy given by that statute), except in simple questions between the society and its members as such; but I do not consider any of them to have rested exclusively on that ground. No such ground of decision was suggested in *Morrison* v. *Glover* (5) or in *The Queen* v. *Trafford* (7), nor, in the opinion of Baron Bramwell, in *Farmer* v. *Giles* (6). Lord Cairns and Lord Hatherley, in *Mulkern* v. *Lord* (1) relied not only on the inappropriateness of this remedy, but also upon the relative position and rights of mortgagor and mortgagee, as making it "impossible that those rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided by 10 Geo. 4. c. 56. s. 27."

The late Master of the Rolls had taken a different view in *Mulkern* v. *Lord* (1); and in the case of *Wright* v. *The Monarch Investment Building Society* (8), followed in the Court of Appeal under his Lordship's presidency by *Hack* v. *The London Provident Building Society* (2), he determined that none of these authorities were applicable to exactly similar questions arising in a building society governed by the Act 37 & 38 Vict. c. 42. Those decisions were held to govern the case now before the House, in the Courts below; and it is from them, in effect, that the present appeal is brought.

I agree with the principle stated in *Hack* v. *The London Provident Building Society* (2) by the late Master of the Rolls, that "it is the duty of the Court to find out first what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts, when considering the construction of a plain statute framed in different words from the former Act." But I think that the principle ought to be stated with this important qualification, that, so far as a later Act, *in pari materia*, is conceived in the same, or substantially the same, terms as a former, the construction placed on those terms in the former Acts by decisions of high authority, and the principle on which those decisions have proceeded, ought not to be disregarded. Of course, if the later statute is plain, its plain meaning must prevail.

The material clause in 10 Geo. 4. c. 56. s. 27 (extended to building societies by 6 & 7 Will. 4. c. 32. s. 4), provided that rules should be made specifying "whether a reference of *any matter in dispute between the society, or any person acting under it, and any individual member thereof, or person claiming on account of any member*," should be made to Justices of the peace of the county, or to arbitrators appointed as therein mentioned. Whatever award was made by the arbitrators was to be binding on all the parties, and was to be final, and was not to be removed into any Court of law, or to be restrained, but might "be enforced by any two Justices of the peace."

The clauses in 37 & 38 Vict. c. 42 which relate to the same subject are the 34th, 35th and 36th sections.

The 34th section provides, that "where the rules of a society under this Act *direct disputes to be referred to arbitrators*," arbitrators shall be appointed, as therein mentioned, of whom a certain number, not less than three, shall be chosen by ballot "*in each such case of dispute*," in a manner to be determined by the rules. Then, after directing how the place of an arbitrator dying or refusing or neglecting to act is to be supplied, it proceeds:—

"*And whatever award shall be made* by the arbitrators, or the major part of them, *according to the true purport and meaning of the rules of the society, shall determine the dispute*; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same, upon the petition of any person concerned. *Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the Registrar, or where the rules of the society direct disputes to be referred to the Registrar the*

award of the Registrar shall have the same effect as that of arbitrators."

"The Court," mentioned in this and the succeeding sections, is (in England) the County Court of the district in which the chief office of the society is situate. "The Registrar" is the Registrar for the time being of friendly societies.

Section 35 enables "the Court" to hear and "determine a dispute" in two cases: one, when there has been a failure in obtaining an arbitration under the rules; the other, "where the rules of the society direct disputes to be referred to the Court or to Justices."

Section 36 makes "every determination by arbitrators or by the Court or by the Registrar under this Act of a dispute" binding and conclusive without appeal or power of removal into any Court of law or of restraint by injunction in equity. But it enables the arbitrators or the Registrar or the Court, at the request of either party, to state a case for the opinion of the Supreme Court of Judicature on any question of law, and to grant to either party to the dispute such discovery as to documents or otherwise as might be granted by any Court of law or equity.

After considering these sections, and the rule of the appellant society founded upon them (which, it may be observed, is almost in the very same words with the 27th section of the Act of 10 Geo. 4), I think it is manifest that although the "disputes" for the settlement of which they provide are not (as in the former Act) in so many words defined as "any matter in dispute between the society or any person acting under it, and any individual member thereof, or person claiming on account of any member thereof," yet the sense of the shorter form of expression, "disputes," is the same. It cannot possibly be supposed to extend to questions between the society and strangers; and the repeated reference to the rules appears to me also to shew that disputes arising under the rules must be intended. This being so, I cannot assent to the opinion that the decisions under the earlier Act, so far as they depend upon the meaning of the words by which the subject-matter of arbitration was therein defined, are displaced or rendered inapplicable by the use of words of either larger or clearer or in any way different signification in the later Act.

And it also appears to me that this is really the point on which the decision of the House in the present case ought to depend: because neither the better means provided by the later Act for enforcing an award, nor the more extended powers thereby given to arbitrators, nor the introduction of the County Court instead of Justices as an authority which in some cases may itself arbitrate, can require, or by reasonable implication justify, a wider construction of the "disputes" to be referred than that word otherwise ought to receive.

It is not enough to shew that some of the arguments formerly used as to the inefficiency of the machinery provided by the earlier statutes, which approved themselves to eminent Judges or to noble Lords in this House, have now lost part of or even all their force, if the subject-matter of arbitration is still left substantially the same. It is to be added, that such rights as that of foreclosure, and others which may arise out of breaches of covenants in deeds, do not necessarily imply a "dispute," as a condition precedent to their appropriate legal or equitable remedies, unless that word should be extended considerably beyond its natural and ordinary sense.

It is undoubtedly true that some of the arguments founded on the insufficiency of the means of enforcing awards provided by the earlier statute have now ceased to be applicable; but I cannot admit that there are no similar arguments which still to a considerable extent apply. The machinery of an award by an arbitrator, and an application to a Court to "enforce compliance" with it, on proof of "the refusal of the party to comply therewith," may conceivably be worked out to results, by which the right of a mortgagor to redeem may be barred or extinguished, or the active assertion of that right prevented; and this may perhaps be thought equivalent to foreclosure—but, if equivalent, it is as a substitute, and not the same thing. The arbitrators are under no obligation to state questions of law for the opinion of the Supreme Court, though, at the request of any party, they have power to do so, and

if they do not, their decision of such questions, however contrary to law, is to be final. The Act enables any society, by its rules, to provide that all disputes shall be referred to the Registrar of Friendly Societies; and the effect must be the same in that case as when either of the other modes of arbitration is provided for. The Registrar of Friendly Societies may be a very suitable arbitrator for mere disputes arising between the society and its members under its rules; but it is to me inconceivable that the Legislature can have meant all questions of breaches of any of the various kinds of covenant, as to title, buildings, lights, easements or otherwise, which the solicitor of the society might have required to be inserted in any mortgage deeds, whether arising with the original mortgagors or with their assignees, trustees in bankruptcy, heirs, devisees, or personal representatives, to be brought, at the option of each particular society, before this public officer, and to make him also (to the exclusion of all ordinary jurisdiction) a Judge of equity in suits for foreclosure and redemption under the obligation of taking all the accounts which may be necessary in such suits. I am not convinced that his office is at all better constituted or adapted for such a purpose than that of a Justice of the peace.

It is never (as it seems to me) very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt or controversy. It is suggested that the policy of this statute is to withdraw all legal questions between these societies and their members from the cognisance of the ordinary tribunals, because the members of building societies may be presumed to be, for the most part, poor persons. But they are not necessarily poor: your Lordships have had before you some instances of such societies in which the amounts advanced upon mortgage have been large. Nor is it clear to me that remedies, divided (or capable of being divided) between three jurisdictions—arbitrators as to the whole matter—the Supreme Court as to questions of law sent to it by the arbitrators—and the County Court for the purpose of enforcing an award—may not sometimes be more costly than those afforded by a single proceeding in the High Court of Justice.

Reluctant as I always am to differ from some of your Lordships whom I know to entertain in this case the opposite opinion, I think that the principles on which *Morrison* v. *Glover* (5), *The Queen* v. *Trafford* (7), and *Mulkern* v. *Lord* (1), were decided, ought still to prevail, notwithstanding the difference between the two statutes, and that the order appealed from ought to be reversed.

LORD BLACKBURN.—This is an appeal from an order of the Court of Appeal dismissing an appeal from the Queen's Bench Division. It was conceded before the Court of Appeal that the case of *Hack* v. *The London Provident Building Society* (2) was not distinguishable from the present case; and consequently the Court of Appeal without any further argument dismissed the appeal. The appeal, therefore, to your Lordships is in substance and reality, though not in form, an appeal from the decision in *Hack* v. *The London Provident Society* (2), as well as from the decision of the Queen's Bench Division in the present case.

The late Master of the Rolls had, in *Wright* v. *The Monarch Investment Building Society* (8), to deal with a building society incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). He held that the matters therein disputed must under that Act be referred, and that the jurisdiction of the Superior Court was ousted. He says, "I cannot accede to the argument that the Act of 1874 must be construed by analogy with the decisions on the old Acts, or by the provisions of the Friendly Societies Act. The words of the Building Societies Act, 1874, are in themselves sufficiently clear, and I must give effect to them without reference to anything else." There was no appeal against the order he made in *Wright* v. *The Monarch Investment Building Society* (8), which was made in March, 1877. But in December, 1877, he made an order in a case of *Mulkern* v. *Lord* (1), which was appealed against, and on appeal was reversed by the Lords Justices. An appeal was brought to this House, which is reported (1), when

the order of the Court of Appeal was affirmed.

The society with which the Courts had to deal in *Mulkern* v. *Lord* (1) was a benefit building society which had not obtained a certificate of incorporation under the Building Societies Act, 1874, and consequently, notwithstanding the repeal of the 6 & 7 Will. 4. c. 32 by section 7 of the Building Societies Act of 1874, the statute in force for regulating the affairs of the society was the 6 & 7 Will. 4. c. 32, and not the Building Societies Act, 1874.

There is no report of what passed either before the Master of the Rolls or the Lords Justices in *Mulkern* v. *Lord* (1); but on referring to the papers in the Library of this House it appears that the late Master of the Rolls commenced his judgment by saying: "The first point I have to decide (and I am told and believe it is a very important point, and there seems to be no decision upon it) is, what is the effect of the 27th section of the Act of Geo. 4 as to the appointment of arbitrators. Now this statute still regulates societies like the society I have before me;" and on that supposition that it was a new question untouched by decisions, he put his construction on the 6 & 7 Will. 4. c. 32.

Lord Justice James very briefly says that if the cases referred to in *Mulkern* v. *Lord* (1) had been thought of, the decision would probably have been different.

In *Hack* v. *The London Provident Building Society* (2), as in *Wright* v. *The Monarch Investment Building Society* (8) and in the case now at bar, the society has obtained a certificate of incorporation under the Act of 1874, and consequently, as regards it, the 6 & 7 Will. 4. c. 32 is repealed.

Mr. Justice Pearson thought that both the Court of Appeal and this House, in *Mulkern* v. *Lord* (1), proceeded entirely on the former statute now repealed, and did not decide upon the construction of the Building Societies Act, 1874; and it certainly is the fact that nothing is said in the opinions delivered in this House to the effect that *Wright* v. *The Monarch Investment Building Society* (8) was ill decided, though the case was cited and relied on by the appellants. If the case is overruled it can only be as a consequence of the *ratio decidendi* of this House.

Mr. Justice Pearson says, "I cannot help thinking that the Act of 1874 was passed purposely to give the arbitrator larger powers than he had under the former Acts, and I should be going counter to the provisions and spirit of that Act if I were to withdraw from the society and its members the right, which it appears to me they possess, of having their disputes determined by the arbitrator, and instead thereof drive them to the expensive luxury of bringing an action in this Court."

I think there can be no question that, if by a legitimate application of the ordinary canons of construction to the Act of 1874 it appears that the intention of the Legislature was what Mr. Justice Pearson states, it is the duty of all Courts of law to give effect to that intention.

The question, I think, is whether it does appear.

Crisp v. *Bunbury* (10) was decided in 1832, on the construction of the Savings Banks Act, 9 Geo. 4. c. 92. But the reasons of the judgment were general. Chief Justice Tindal, after pointing out that the nature of a savings bank was an institution intended to comprehend a very large number of depositors, chiefly from the lower walks of life, many of them contributing very small sums, and that to allow actions at law would cause ruin to the institution by the expenses, proceeds to say, "It is evident, therefore, that the Legislature contemplated the cheap, simple, speedy and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory and uncertain remedy by an action at law; and we think we should defeat that very serviceable object —serviceable alike to the depositors and to the institution—unless we construe the words used as words which import an obligation to refer, and which take away the right to sue in the Superior Court." Every word of this is applicable to a friendly society, and I do not think it is now disputed that the 10 Geo. 4. c. 56. s. 27, is to be construed as importing an obligation to refer disputes between the members of friendly societies, and to take away the right to sue in the Superior

(10) 8 Bing. 394; 1 Law J. Rep. C.P. 112.

Courts. In *Mulkern* v. *Lord* (1) Lord Cairns, without deciding that question, assumes it to be so. But a building society is more than a friendly society, and the disputes which may arise between the members of such a society may, and often do, relate to considerable sums of money. When the Legislature, in the now repealed Act 6 & 7 Will. 4. c. 32, regulated benefit building societies, the 4th section was in these words, "That all the provisions of" 10 Geo. 4. c. 56, and 4 & 5 Will. 4. c. 40, the Friendly Societies Acts, "so far as the same may be applicable to the purpose of any building society, and to the framing, certifying, enrolling and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof in such and the same manner as if the provisions of the said Acts had been expressly re-enacted." There very soon arose a controversy as to the effect of this enactment. It was held, and the decision of this House in *Mulkern* v. *Lord* (1) is that it was held rightly, that the provisions of the Friendly Societies Acts, as incorporated in the 4th section of the 6 & 7 Will. 4. c. 32, applied only to such disputes as could arise between members of friendly societies as such, and which were of such a nature as might reasonably be referred to Justices of the peace, that being the ultimate tribunal appointed by 10 Geo. 4. c. 56; and though I cannot bring myself to doubt that a dispute between the society and the member of a building society as to the terms on which his mortgage is to be redeemed is a dispute between the society and him as a member of the benefit building society as such, yet I do not think it such a dispute as could arise between a friendly society and one of its members as member of the friendly society. I quite agree it is not a dispute which the Legislature could be reasonably supposed to have intended to leave to Justices of the peace.

The last decision in point of date on this subject was *The Queen* v. *Trafford* (7). In that case the opinion of the Court, as I read it, was that where the referees had jurisdiction at all it was exclusive jurisdiction, but that over such a dispute they had no jurisdiction. There was a decision in *Callaghan* v. *Dolwin* (11) that the Justices had no power to state a case when acting under the Friendly Societies Act. This was decided in 1869.

Now when in 1874 the Legislature repealed the 6 & 7 Will. 4. c. 32, and were considering what provisions they would enact in lieu of it, they could not possibly know what this House would hold in *Mulkern* v. *Lord* in 1879, but all concerned in building societies knew what had been decided on the repealed statute. I do not dispute that a few express words might have made it quite clear that the intention of the Legislature was to say that disputes relating to mortgages and the redemption of them shall be referred, and settled in no other way, the jurisdiction of the Superior Courts being ousted, and that those express words are not there. But I think it is enough if we can collect the intention to have been so. And I think we can.

37 & 38 Vict. c. 42, by section 16, enacts what the rules of the building society "shall set forth." The 4th and 9th seem to me material. There must be in the rules provisions as to the terms on which mortgages may be redeemed. And there must be provisions as to whether disputes between the society and any of its members (which surely must include disputes as to the terms on which mortgages may be redeemed) shall be settled by reference to the Court (that is, the County Court) or to the Registrar or to arbitration. Those words exclude the notion of such disputes being disposed of in any fourth way, such as suing in a Superior Court. I quite assent to what is said by Lord Cairns in *Mulkern* v. *Lord* (1), that though the rules provide that the jurisdiction shall be ousted, that alone will not be effectual. It must be shewn that the Legislature have so provided. Here the Legislature have required that the rules shall so provide, which carries us a good way in saying what was the intention; more especially when knowing that the reason, or at least a principal reason, why the Courts of law had held that the provisions of the Friendly Societies Acts, though incorporated in the 6 & 7 Will. 4, did

(11) 38 Law J. Rep. M.C. 110; Law Rep. 4 C.P. 288.

not extend to disputes as to mortgages, was, that the reference there was to Justices: they appoint a different tribunal. But it does not stop there; there are sections 34, 35 and 36. Section 35 provides that, where the matter is one which, by the rules, should be referred to arbitration, and one party has not, within forty days, complied with a request to join in appointing arbitrators, or the arbitrators have not made an award, the Court (that is, the County Court) may hear and decide the dispute. That seems to me equivalent to an enactment that no other Court shall, in such a case, do so. And the 36th section not only makes the determination by arbitrators or by the Court or by the Registrar final and conclusive, but makes a proviso, I think, plainly suggested by the case of *Callaghan* v. *Dolwin* (11), that a case may be stated on any question of law, which goes very far to remove any argument that the Legislature could not have intended to refer questions of law to such a tribunal.

The result is, that I come to the same conclusion as that come to by Mr. Justice Pearson in *Hack* v. *The London Provident Building Society* (2).

Since this opinion was printed and circulated, I find that the Lord Chancellor takes a different view of the case. I need hardly say that I have carefully considered his reasons, and that I now speak with diffidence. But I still entertain the opinion I have expressed, and, that being so, I move that the judgment be affirmed, and the appeal dismissed with costs.

LORD WATSON.—I have come to the same conclusion with my noble and learned friend (Lord Blackburn) not without hesitation, because I am sensible of the weight of those considerations which have been so forcibly stated by the Lord Chancellor against the view which I have taken. The provisions made by the Act 6 & 7 Will. 4. c. 32, and the Act 10 Geo. 4. c. 56, therewith incorporated, for the settlement of disputes arising between a building society and its individual members differ from the enactments of 37 & 38 Vict. c. 42, and the question we have to consider, shortly stated, is, whether that difference is sufficient to take the present case out of the rule of *Mulkern* v. *Lord* (1) and previous decisions upon the same point.

By the statute of 10 Geo. 4. c. 56. s. 27, it is enacted that the rules of the society shall specify whether such disputes shall be referred to arbitrators or to Justices of the peace; and, in the event of reference being made to arbitrators, the enforcement of their award, which is declared to be final to all intents and purposes, is committed to the Justices. Where such disputes are by the rules referred to Justices of the peace, section 28 provides for the manner in which these are to be heard and determined, and section 29 further enacts that every sentence, order and adjudication of any Justices under the Act shall be final and conclusive. These provisions of the Act 10 Geo. 4. c. 56, are, by its terms, solely applicable to friendly societies, according to whose constitution members make money contributions to the society, in return for which they themselves in case of sickness, or their representatives in case of their decease, receive certain payments, the amount of such contributions or payments, and the conditions attaching to them, being matters provided for by the rules of the society. It was not in the contemplation of those who framed the Act that a member and his society should, under the rules, stand to each other in the relation of mortgagor and mortgagee. The investment of the funds of the society on real or heritable securities, or heritable property, is sanctioned by section 13; but it is obvious that a member borrowing on mortgage, under the authority of that clause, would not be transacting with the society in his character of *socius*.

The Act 6 & 7 Will. 4. c. 32, which was passed for the regulation of benefit building societies, incorporates the provisions of the Act 10 Geo. 4. c. 56, but that only "so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling and altering the rules thereof." The Act of William did undoubtedly contemplate that members of a benefit building society were, with a view to the erection or purchase of dwelling-houses, to receive advances from the stock of the society, to be secured by way of mortgage until the value of their shares

had been fully repaid, together with interest and other fines and payments; and hence arose the contention that all disputes in regard to these mortgages must be settled by a reference to arbitrators, or to Justices of the peace, in terms of the Act 10 Geo. 4. c. 56. That contention was finally disposed of by the judgment of this House in *Mulkern* v. *Lord* (1). I understand the sole *ratio* of that judgment to be that, although the statutory machinery already provided for the settlement of disputes arising in friendly societies was made applicable by the statute of William to benefit building societies, yet its application was in the case of these societies limited to disputes *ejusdem generis* with those contemplated by the Act of Geo. 4. The Lord Chancellor (Earl Cairns), after pointing out the limited character and scope of the reference provided by the Friendly Societies Act of 1829, went on to say that it appeared to him to be impossible that the relative rights of the mortgagor and mortgagee, "and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided by 10 Geo. 4. c. 56. s. 27, and," he said, "I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage."

The Building Societies Act, 1874, under which the appellant society is incorporated, contains new enactments as to the tribunals by which disputes are to be determined. It provides (sections 34 and 35) that the rules of the society may direct such disputes to be referred either to arbitrators or to the Registrar of Friendly Societies, who is also Registrar under the Act, or to the "Court"—that is, the County Court of the district in which the chief office or place of meeting for the business of the society is situate. Twelve arbitrators are (section 34) to be nominated, of whom a certain number, not less than three (such number to be fixed by the rules), are to be chosen by ballot, in each case of dispute. It is declared (section 34) that the award of a majority of the number of arbitrators so fixed shall determine the dispute; and that the award of the Registrar, when the rules direct reference to be made to him, shall have the same effect. No executive power is given to the arbitrators or to the Registrar; but it is enacted that, in the event of either of the parties to the dispute refusing or neglecting to comply with their award, the "Court" shall enforce compliance with the same upon the petition of any person having interest. The "Court" is empowered (section 35) to hear and determine disputes, not only in the case of their being referred to it by the rules, but also in cases where one of the parties has failed within forty days to comply with the application of the other to have the dispute settled by arbitration, or where the arbitrators have refused, or for a period of twenty-one days have neglected, to make any award. Lastly, it is enacted (section 36) that every determination of a dispute, whether by the arbitrators, the Registrar or the Court, shall be final and not subject to review: provided always that it shall be competent for any one of these tribunals to state a case for the opinion of the Supreme Court on any question of law, and that they shall each and all have power to grant to either party to the dispute such discovery as might be granted by any Court of law or equity.

I do not think it can be inferred from the character of the tribunals thus constituted, and the nature of the powers conferred upon them, that it is impossible that the Legislature should have intended to commit to their determination questions or disputes arising between an advanced member and the society in their relative characters of mortgagor and mortgagee. In 1865 the Legislature had already conferred upon County Courts (28 & 29 Vict. c. 99. s. 1) jurisdiction to exercise the power and authority of the High Court of Chancery in all suits for foreclosure or redemption, or for enforcing any charge or lien, when the mortgage charge or lien does not exceed in amount the sum of 500*l*. There does not appear to me to be any *a priori* improbability that the Legislature should, in 1874, either entrust to these Courts the duty of determining such questions between a benefit building society and its advanced members, or authorise them to pronounce, when requisite, an order for foreclosure or redemption, after the rights of parties

had been ascertained by arbitrators or by the Registrar.

But the important question still remains, whether the Legislature has, by the enactments of the statute of 1874, directed questions which involve the adjustment of rights created by mortgage to be referred to these tribunals. It is of very little consequence that they should be capable of dealing with such matters, unless it plainly appear from the provisions of the statute that the Legislature intended to give them jurisdiction.

Are, then, questions arising as to the redemption of a mortgage given to the society by an advanced member, as required by the rules, in order to secure the future payments becoming due by him as a member of the society, "disputes" within the meaning of sections 34, 35 and 36 of the Act of 1874? That question must, in my opinion, be answered in the affirmative.

The 16th section of the statute expressly provides that the rules of the society shall set forth, *inter alia*, "the terms upon which shares may be withdrawn and upon which mortgages may be redeemed." Now, it appears to me that in making that provision the Legislature must have had in view, mainly, if not solely, mortgages to be granted in security for the repayment of advanced shares; and that the object of the provision is to secure to all who become members of the society full disclosure of the rights which they acquire and of the liabilities which they thereby incur. I am unable to regard the liability of an advanced member under such a mortgage as the liability of a stranger, and not as the liability of a member. By section 14 the liability of a member, in respect of any share upon which an advance has been made, is limited to the "amount payable thereon under any mortgage or other security, or under the rules of the society." The mortgagor is a member as regards the leading covenants of the mortgage, and I can see no reason for treating him *quoad ultra* as a mere stranger. In the case of every holder of shares upon which an advance has been made, it is an essential condition of his membership that he shall stand in the relation of mortgagor to the society as mortgagee. Unless he comply with that condition, he cannot become an advanced member, either in terms of the rules or within the contemplation of the statute. It therefore appears to me that every controversy arising between the society and a member upon whose shares an advance has been made, as to their respective rights under a mortgage executed in terms of the rules, is in reality a dispute between the society and a member within the meaning of the Act. I am strongly confirmed in that impression by the power which section 36 confers upon the arbitrators, the Registrar, or the Court to state, at the request of either party, a case for the opinion of the Supreme Court on any question of law, and also by the extensive powers of granting discovery conferred upon them by the same section. These powers appear to me to indicate that it was in the contemplation of the Legislature that the arbitrators and other referees might, in the exercise of their statutory jurisdiction, occasionally encounter serious questions of law, in the solution of which it was proper that they should have the aid of the Supreme Courts of the country.

The reference clauses of the Act (sections 34 and 35) speak of "disputes" generally, but it is obvious from the context that the expression is only meant to comprehend those disputes which arise between the society and its members, or persons claiming against the society as in right of a member. In the concluding enactment of section 34, such disputes are defined as "any dispute arising in a society under this Act," and section 21 enacts that the rules are to be binding "on the several members and officers of the society, and on all persons claiming on account of a member or under the rules." A stranger transacting with the society must of course have regard to the powers of the society as constituted by its rules; but a dispute between him and the society would not, in my apprehension, be in any sense a dispute arising within the society.

It was maintained in argument that the disputes which, by the Act, are made the subject of reference are, by its context, limited to disputes arising under the rules. The enactment chiefly relied on in sup-

port of that contention occurs in section 34, which, *inter alia*, provides that "whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute." I should have attached great weight to that argument had I been able to read the words "according to the true purport and meaning of the rules" as having reference to the award of the arbitrators; but I am satisfied that they refer to the "major part" of the arbitrators, because the due selection of these arbitrators, and the number required to constitute a majority, can only be ascertained by reference to the rules.

I shall not refer in detail to the decisions which preceded *Mulkern* v. *Lord* (1). The ground of judgment upon which the House proceeded in that case had previously been adopted by Lord Cranworth in *Fleming* v. *Self* (4); but in other cases it has been expressly decided that questions relating to the redemption or foreclosure of mortgages, in the case of benefit building societies registered under the Act 6 & 7 Will. 4. c. 32, are not disputes arising between the society and its members in their capacity of *socii*. In the view taken by the House in *Mulkern* v. *Lord* (1) it became unnecessary to consider the point, so that the authority of these decisions is not impeached by that case. These decisions are, accordingly, direct precedents upon the construction of statutory provisions which are akin to the enactments of the Building Societies Act, 1874. But the question whether certain proceedings are to be regarded as disputes between the society and its members, arising within the society, appears to me, in the case of each statute, to depend upon the intention of the Legislature to be gathered from the whole provisions of the Act. In the present case the statute with which we are dealing differs from its predecessors as regards the tribunals to which disputes are to be referred, the powers conferred upon them, and the matters connected with the mortgages of members which are to be provided for in the rules; and as these new enactments have led me to form the opinion which I have already expressed, I do not conceive that I am fettered by those decisions which involve the construction of the earlier statutes.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors — Charles A. Russ, for appellants; Reep, Lane & Co., for respondent.

[IN THE COURT OF APPEAL.]

1884. April 2. } WALMSLEY *v.* MUNDY. *Ex parte* GOODENOUGH.*

Practice—Receiver—Reference to Master to report—Power of Court to enquire into Report—Equity Practice.

Where a receiver has been appointed, and certain questions have been referred to a Master of the Queen's Bench Division to report, the report of the Master, by analogy to the practice in the Chancery Division in respect to the certificate of a chief clerk, is not final and conclusive; the Court therefore has power to enquire into the accuracy of such report.

The plaintiff, who had recovered judgment in an action against the defendant for goods sold and delivered, was, by an order made by North, J., in chambers, on the 31st of March, 1883, appointed receiver of the rents and profits of certain premises belonging to the defendant, but without prejudice to the rights of prior incumbrancers. Prior to the date of that order—namely, on the 22nd of March—the defendant had executed a mortgage on the premises in favour of Goodenough.

On the 25th of June a summons was taken out by Goodenough, asking that the order of North, J., should be discharged; that the receiver should be ordered to withdraw from possession of the premises and restore certain goods which he had removed; that he should remove a certain wall which had been erected by him upon the premises; that an enquiry should be

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

held as to the damages sustained by Goodenough, and that the receiver should be ordered to pay the same.

The summons came on before Williams, J., in chambers, by whom it was referred to the Divisional Court. On the 7th of August the Divisional Court (Pollock, B., and Lopes, J.) ordered all questions, including the validity of the mortgage to Goodenough and the amount due thereon, to be referred to one of the Masters to report.

In January, 1884, the Master made a report to the Court to the effect that at the time of the execution of the mortgage to Goodenough there was no debt due to him from Mundy; that the execution thereof was a mere colourable transaction, and was intended to defeat the creditors of Mundy.

On the 26th of February an application was made by Goodenough to the Divisional Court to set aside or vary the report, upon the ground that there was no evidence to support the findings of the Master, and also for an order in the terms of the summons of the 25th of June, 1883, or such other order as to the Court might seem fit.

The Divisional Court (Denman, J., Manisty, J., and Williams, J.) declined to consider the evidence upon which the report of the Master was founded, and refused the application.

Goodenough appealed. The appeal came on for hearing on the 26th of March, and was then adjourned, in order that an opportunity might be given to question the orders made on the 7th of August, 1883, and the 26th of February, 1884, respectively.

Willis, Q.C., and *R. G. Glenn* (with them *Dunham*), for the appellant, contended that the Court, by analogy to the practice in equity relating to the reference of matters by the Judge to his chief clerk, had power to consider the materials upon which the Master's report was founded, and could set it aside or vary it, if necessary.

Warmington, Q.C., and *H. D. Bonsey* (with them *Murphy, Q.C.*), for the receiver, contended that there was no analogy between a reference to a Master of the Queen's Bench Division to report and a reference by a Judge in equity to his chief clerk, and consequently that the report of the Master was final and conclusive, and could not be questioned. They referred to *In re Wright* (1), *In re Oxlade* (2) and *Coulson* v. *Graham* (3).

Willis, Q.C., replied.

BRETT, M.R.—In this case an order was made by a Judge in chambers that a receiver should be appointed, on account of a judgment which had been recovered in the Queen's Bench Division, to exercise certain powers with regard to the property of the judgment debtor, but subject to the rights of prior incumbrancers. Upon that, the claimant, after having applied to the receiver to treat him as a prior incumbrancer, took out a summons in chambers —but not before the same Judge who had appointed the receiver—for an order that the receiver might be removed, and also claimed other relief. That summons came before Mr. Justice Williams at chambers, who, on account of the novelty and difficulty of the proceedings, referred the matter to the Court. Thereupon the Court, assuming to act under their original common law jurisdiction, upon it being pointed out that there were many affidavits containing probably conflicting evidence, referred them to the Master to report. The Master reported that the claimant was not a prior incumbrancer, and also that there was no debt to support the alleged mortgage, which was a mere sham and was drawn up to defeat the defendant's creditors. When the case came before the Divisional Court, the counsel for the claimant challenged the accuracy of the report, and asked the Court to examine the affidavits and evidence upon which it was made, and to come to a conclusion whether they could agree with the Master. But the Court, who had assumed to send the matter to the Master, not under any equity jurisdiction, nor under the Judicature Acts, but under their original common law jurisdiction to refer to the Master, declined to examine into the

(1) 12 Com. B. Rep. N.S. 705, 707.
(2) 1 Com. B. Rep. N.S. 454; 26 Law J. Rep. C.P. 129.
(3) 2 Chit. Rep. 57.

grounds of the report or to look at the affidavits, or in any way to enquire whether the report was correct, and declared that, according to the ordinary common law practice, they would accept the report as conclusive. The summons was therefore dismissed, and the receiver was left unmolested. The question now is whether the action of the Divisional Court was right. Then comes a difficulty as to what ought to be the practice in such a case from beginning to end. Under the old practice, before the Judicature Acts, neither of these orders could have been made in a Court of common law, or in the chambers of the common law Judges. A receiver would have been appointed by a Judge in equity. The second summons also could only have come before the same Judge who had made the order for a receiver, and who might or might not have referred it for enquiry to his chief clerk. If he had so referred it, he must have done so by virtue of some Act of Parliament. An enquiry similar to that which was made by the Master in this case would then have been made by the chief clerk, who would have made a report similar to the Master's report, or would have given a certificate. If the parties objected to it they would have applied to the Judge, who would have heard the matter himself in Court; and, as I understand the practice, he would not, without some particular reason, have allowed further evidence to be given before him, although he might have done so. There would therefore practically have been an appeal, although in name only, from the chief clerk, for his certificate would not be a decision at all. That being the practice in equity, what ought to be the practice in the common law division since the Judicature Acts? The first summons was taken out before a Judge in chambers, by whom the order appointing a receiver was made. In making that order, the Judge was not exercising a common law jurisdiction, but was acting as a Judge in equity. If the matter had strictly followed the equity practice, the second summons ought to have been taken before the same Judge personally. But in the common law division the Judge is not a personality, but is the Judge at chambers, and the matter would not therefore necessarily be heard before the same Judge, but under the same jurisdiction—that is, by a Judge at chambers. That is following the equity practice, because a common law Judge at chambers would, before the Judicature Acts, have had no more jurisdiction to hear the second summons than he would have had to hear the first; he is therefore acting under the Judicature Acts as a Judge in equity. Those Acts never intended that everything should be done in the common law division in exactly the same way as in the Chancery Division. That cannot be, as things are different in the two divisions. Acting therefore as nearly as possible by different machinery, the Judge in chambers, acting on the second occasion as the deputy of the Divisional Court, was right in referring the matter to the common law division. That Court had no jurisdiction at common law to entertain the summons, but were acting under an equity jurisdiction. If there had been no Judge in chambers, the Divisional Court would have been exercising this jurisdiction which would have been exercised in equity by the same Judge who had made the original order. They were therefore exercising the jurisdiction of the equity Judges; but the matter could not be sent to a chief clerk, because there is none. It was not intended that the Judges must exercise the whole jurisdiction themselves, if they have something which is analogous to a chief clerk. They have Masters who are to assist the Court; and, more than that, they have official referees, and also power to appoint special referees. There are therefore three officers of the Court, each of whom is analogous for this purpose to the chief clerk. How then is that equitable jurisdiction to be exercised? It seems to me to follow from necessity that it must have been the intention of the Judicature Acts that the practice of the equity Courts, although it cannot be exactly followed, must be followed as nearly as possible. The Court therefore were right in referring the matter to the Master to report, and they might have referred it either to an official or to a special referee. In so doing they were exercising an equity jurisdiction, and were calling upon the

Master to report in a manner as nearly analogous as possible to that in which a chief clerk would have made a report to the Judge. The objection which has here been taken to the accuracy of the Master's report would, in the case of a chief clerk's certificate, have been enquired into by the Judge, and, if necessary, further affidavits would have been allowed to have been put in, to see whether the report was correct. If the Court had referred the matter, under the Judicature Acts, to an official or special referee to report—a distinction being taken between a reference where the referee is to report and one where he is an arbitrator—the Court would have been bound to hear the grounds upon which the report was made. But it is said that because the matter was sent to a Master the Court were exercising an original common law jurisdiction, and could not therefore allow any objection to be taken to the accuracy of the report, and that they would only upon their own motion speak to the Master, or send the matter back to him for a further report, and they wholly refused to allow the accuracy of the report to be challenged. The answer is that they were not exercising an original common law jurisdiction, nor a jurisdiction to which the common law practice applied, but were exercising an equity jurisdiction to which the equity practice should have been applied as nearly as possible. If that be so, the Court, upon a report made under these circumstances, ought, by analogy to the practice of the equity Courts, to have allowed the parties to bring before them the grounds of the objection to the accuracy of the report, in the same way as a Judge in equity would have entertained an objection to the accuracy of a chief clerk's certificate. The consequences in this case, to my mind, shew that this must and ought to be the practice, because the receiver being appointed with regard to the receipts of the rents and profits of the estate, and a dispute as to prior incumbrancers having arisen, the question whether a person is a prior incumbrancer or not is one of title which might be of vital importance. I cannot help thinking that the Judges in the Divisional Court overlooked the fact that they were exercising an equity jurisdiction, and that they should therefore have followed the equity practice, which in that case would have allowed the parties to bring before them the affidavits which were used before the Master. That view raises a difficulty, because the case was sent to the Master on account of the multiplicity of the affidavits, and, no doubt, under the practice which I have stated, the whole matter would have to be again enquired into by the Court, but under different circumstances, for they would have the Master's report, which would not be set aside unless it was clearly wrong. That difficulty, however, is not insuperable, and must have arisen if the matter had been sent to an official referee. They should have allowed the affidavits to have been brought before them, and, if satisfied that the Master's report was correct, should have left the receiver in possession. If they were clearly satisfied that the report was not correct, they would make an order upon the receiver to go out accordingly. If there was any doubt as to the evidence upon the affidavits whether the claimant was a mortgagee or not, they would not, according to the equity practice, have made a peremptory order at that stage, but would have given leave to the claimant to bring an action against the receiver to try the right. It therefore follows from this, that, as we have to do what the Divisional Court should have done, we must go further into this matter, and allow the objection to the report to be taken before us.

BAGGALLAY, L.J.—The order by which the receiver was appointed was made in accordance with the order which would have been made by the Judge in equity before the Judicature Acts. The authority of the Judge in chambers to make such an order depends upon the operation of the Judicature Acts, which authorise the Judges of the Queen's Bench Division to do that which only the Judges in equity could do. The Divisional Court have been in the habit of from time to time referring matters to a Master to report, and upon receipt of the report have acted upon it as they thought fit. The reference of this kind was not ordered in accordance with the old practice, but was an adoption of the equity practice with regard to the ap-

pointment of a receiver; and the order was made in the same way as if an application had been made to the Judge at chambers in equity and he had referred the question as to the validity and amount of a claim. The reference to chambers is a reference to the Judge himself in chambers instead of to the Judge in Court, but the preliminary matters are dealt with by the Judge's chief clerk, who has opportunities of communicating, and frequently does communicate, with the Judge. When the chief clerk has arrived at a conclusion, a certificate is drafted. After a lapse of time, during which the parties can obtain the decision of the Judge himself, the certificate is signed; but it is liable to be varied. This would be done upon a summons, which would be heard by the Judge, who has full power to review what has been done by his representative in the course of the enquiry. That being the course of procedure adopted in equity, the Divisional Court referred the matter to the Master, and it does not seem to me that the equity procedure would have been adopted unless when the report was made there was an opportunity, if necessary, of reviewing the conclusion of the Master. The report was adverse to the claimant, and it was pointed out that it contained no reference to the circumstances which led to that conclusion. That matter would have come before the Judge in equity, and would have been liable to be reconsidered by him. It was argued that it has not been the practice in the common law division, where a matter has been referred to the Master, to consider whether the report is well founded or not, but that the Court act upon it as it stands. I do not understand the argument to go so far as to say that the Court have no power to review it, but only that the Court do not, in their discretion, think fit to enter into the enquiry, and that therefore the decision of the Master is conclusive. If it had been shewn that it was conclusive, I should, with regret, have felt bound to adopt that view. But I think that this proceeding is an adoption of an equitable process, which ought, in justice, if adopted at all, to be adopted in its integrity; and when, therefore, such a proceeding has been commenced in the Queen's Bench Division, the same review should exist as in the Chancery Division. I think the way in which the matter will work itself out will be this, that the Judges in the Divisional Court should proceed at once, if the evidence is before them, to consider whether the report is well founded or not, and, if the evidence is not sufficient, should refer the matter back to the Master to report upon the facts; and when all the facts are before them the propriety of the decision could then be arrived at. It appears to me that, in order to carry out strictly the analogy to the former proceedings in the Chancery Division, if the Divisional Court had not sufficient materials before them to proceed at once with the application to vary the report, they should have sent it back to the Master, and so have obtained the facts necessary to enable them to arrive at a conclusion; but they do not seem to have adopted either course. The matter is now before us to deal with it as the Divisional Court should have done. We must therefore see whether the report was well founded or not.

LINDLEY, L.J.—I am of the same opinion. When the matter is looked into, the order as it now stands appears to be one which cannot be right. The original order made amounts to this, that where a receiver has been appointed, and a party comes to the Court with a complaint that the receiver has no right to interfere with him because he has a prior right, the finding of the Master, even upon a question of title, is final, and there is no appeal. That strikes one as a startling proposition, and, in order to see whether the Divisional Court has made a mistake, it is necessary to consider the practice as it formerly stood. The jurisdiction of the Queen's Bench Division to make an order appointing a receiver is one given by the Judicature Acts. The plaintiff here obtained judgment against Mundy, and a receiver was appointed to enforce that judgment. The form of order was right, and the appointment was made subject to the rights of prior incumbrancers. But it so happens that the receiver here was the execution creditor. That has its advantages and disadvantages. Here the receiver entered into possession of the premises which were claimed by Goodenough on the ground

that he had a prior title, and he applied to the Court to relieve him from any interference on the part of the receiver. The claimant could not bring an action without leave against the receiver, because he was an officer of the Court; and he was bound to apply to the Court for leave, and he did so apply. That application was right in form, and came before a Judge in chambers, who might have disposed of the summons himself, but who referred it to the Court. If he had not done so, but had thought fit to refer it to the Master, he would have had jurisdiction to do so. In such a case there would have been an appeal against the report of the Master to the Judge in chambers, and from him to the Court. The summons, however, was referred to the Divisional Court, who referred it to the Master. Is it to be said that because it was so referred there is no appeal from the decision of the Master, when if the matter had been referred by the Judge at chambers there would have been an appeal? That cannot possibly be right. If it be true that there is no appeal against the report of the Master, a question might arise whether the Divisional Court had power to refer the matter to the Master at all. It seems to us that the order made by the Divisional Court on the 7th of August was perfectly right, and that they had jurisdiction to make it. The question then arises, whether the report of the Master can be looked into; and whether, in short, any appeal can be brought against it. The reports of Masters to which the Divisional Court have been accustomed have been made under a different practice, and the Court have treated this order as if it had been made under the old common law practice. But that was a mistake: for the jurisdiction to make the order was given by the Judicature Acts, and to enable the common law Courts to give that kind of relief which formerly they had no power to give, and which was only given in the Chancery Courts. The Chancery practice, so far as it can be worked out, is given to the Queen's Bench Division. That practice, which when looked into causes the difficulty to vanish, is laid down and accurately explained by Vice-Chancellor Kindersley in the case of *Randfield* v. *Randfield* (4). The Vice-Chancellor there investigated the point raised, and disposed of it without any further proceedings. In this case it may be that it was competent for the Court to make the order of the 7th of August; they might have satisfied themselves on the matter, or have referred it to the Master, not under the old common law practice, but under the Judicature Acts; and by analogy to the Chancery practice the report cannot be said to be final. The result therefore will be that the appeal from the order of the 7th of August will be dismissed, but the appeal from the order of the 26th of February must be allowed and the case be now heard upon the merits.

[Their Lordships then heard the case upon the merits and set aside the Master's report.]

Solicitors—A. G. Ditton, for plaintiff; Broad & Broad, for Goodenough.

1884. March 21.

SHARP *v.* FOX.

Landlord and Tenant—Distress—Illegal Sale by Landlord—Statute 2 *Will. & Mary, sess.* 1. *c.* 5*—Declaration by Lodger—Lodgers' Protection Act,* 1871 (34 *&* 35 *Vict. c.* 79), *ss.* 1 *and* 2.

The plaintiff was a lodger to a tenant upon whose premises a distress had been levied by the defendant, the superior landlord. The distress was on the 17*th of October, and among the goods seized was certain property belonging to the plaintiff. The goods so seized were sold on the* 22*nd of October—that is to say, before the time limited by the provisions of* 2 *Will. & Mary, sess.* 1. *c.* 5, *had expired. On the* 23*rd of October the plaintiff served on the defendant the declaration required by the Lodgers' Protection Act,* 1871, *section* 1, *and subsequently brought an action against him for a wrongful sale of the goods:*—Held, *that the plaintiff was entitled to recover,*

(4) 1 Dr. & S. at pp. 314, 315; 30 Law J. Rep. Chanc. 18.

Sharp v. *Forde.*

inasmuch as the sale by the defendant on the 22nd of October was illegal, and the plaintiff had thereby lost the opportunity which he would otherwise have had of protecting his goods under the provisions of 34 & 35 *Vict. c.* 79.

This was an appeal on the part of the plaintiff from a judgment of Mr. Holroyd, County Court Judge, in an action brought by the plaintiff against the defendant for wrongfully seizing and selling certain goods, the property of the plaintiff, under the following circumstances. The plaintiff was a lodger in a house of which the defendant was the superior landlord. The tenant of the house having got into arrears of rent, the defendant on the 17th of October, 1883, levied a distress for rent due to him, and seized certain goods, a portion of which belonged to the plaintiff. These goods were sold on the 22nd of October. On the 23rd of October the plaintiff served on the defendant a declaration in accordance with the provisions of the Lodgers' Protection Act, 1871, and subsequently brought the above action for wrongful seizure and sale. The amount claimed in the action was 30*l.*, but by agreement between the parties the damages were fixed at 17*l.*, in the event of the plaintiff being entitled to recover. No rent was at the time of seizure due from the plaintiff to the tenant.

The learned County Court Judge held that the plaintiff could not maintain his action for a breach of the provisions of the Lodgers' Goods Protection Act, inasmuch as that statute merely rendered unlawful acts done by the landlord with reference to a lodger's goods after he had been served with a declaration, and gave judgment for the defendant on the ground that there was no evidence of special damage (1).

The plaintiff appealed.

Henry Kisch, for the plaintiff.—The landlord has no right to sell his tenant's goods at all, unless he complies with the provisions of the statute authorising the sale. Here the sale by the defendant was altogether irregular, "five clear days" not having elapsed from the date of the seizure. If the statutory provisions had been duly complied with, the plaintiff's notice would have been served in sufficient time to protect his goods. The provisions contained in the Lodgers' Goods Protection Act, 1871, can be rendered altogether nugatory, so far as the protection of a lodger's goods is concerned, if the rights of the parties are not to be regulated with reference to the provisions contained in the Act of Will. & Mary.

Cannot, for the defendant.—The plaintiff is not entitled to succeed. The goods in question were sold before the declaration was given under the Act of 1871, and the lodger was therefore unable to prove special damage. The Lodgers' Goods Protection Act, 1871, only gives a right of action against superior landlords if the latter proceed with a distress after the lodger has served a declaration upon them. The five days mentioned in the Act of Will. & Mary in no way affects a lodger's rights, but was for the purpose of giving a tenant time to replevy. He cited *Rodgers* v. *Parker* (2) and *Lucas* v. *Tarleton* (3).

(1) By 2 Will. & Mary, sess. 1. c. 5. s. 2, "where any goods shall be distrained for rent reserved and due upon any demise or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof . . . . replevy the same, in such case the person distraining shall cause the goods so distrained to be appraised by two appraisers, and after such appraisement may sell the same for the best price that can be gotten for them towards satisfaction of the rent and charges of the distress, appraisement and sale," &c.

The Lodgers' Goods Protection Act (34 & 35 Vict. c. 79), after reciting that "lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on their furniture, goods and chattels for arrears of rent due to such superior landlord by his immediate lessee or tenant," provides by section 1 that "if any superior landlord shall levy or authorise to be levied a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing" containing certain particulars specified in the section. By section 2 a superior landlord is liable to an action of law at the suit of a lodger for proceeding with a distress after service of a declaration and compliance with the conditions imposed by section 1.

(2) 18 Com. B. Rep. 112; 25 Law J. Rep. C.P. 220.

(3) 3 Hurl. & N. 116; 27 Law J. Rep. Exch. 247.

Sharp v. *Fowle.*

LORD COLERIDGE, C.J.—I confess it appears to me that this case is unarguable. The landlord's right to sell his tenant's goods under certain circumstances is given by statute, and it was the defendant's duty to take care that the provisions of the statute which gave such right had been duly complied with. Now one of the conditions imposed by the statute is that the landlord shall not sell until after the expiration of five days between the date of the seizure and the sale. That being the state of the law in 1871, the Lodgers' Goods Protection Act was passed, which, after reciting that "lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on their furniture, goods and chattels," proceeded to enact by section 1 that "if any superior landlord shall levy or authorise to be levied a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing" containing certain particulars enumerated in the section; and if that is done, and other conditions (not applicable here) are complied with, the distress cannot, so far as the lodger's goods are concerned, be further proceeded with. But here the landlord sold before the five clear days limited by the statute of Will. & Mary, and the notice served by the lodger was consequently too late. The damage done to the lodger was, as it seems to me, occasioned by the landlord's neglect to observe the law. I think therefore that this action will lie, and that the judgment of the County Court Judge must be reversed.

CAVE, J.—I am of the same opinion. The Act of 1871 was passed to protect lodgers against loss and injustice, to which they had been previously subjected by the power given to superior landlords to levy a distress on lodgers' goods. Previous to the passing of Will. & Mary, a landlord had no right to sell at all, and that statute only conferred the right upon certain conditions which have not been complied with in this case. The Act of 1871 was passed with reference to the previous Act and its provisions, one of which was that the landlord should not sell until after five clear days had elapsed from the date of the taking of the distress. Here the landlord sold before the expiration of that time, and so interfered with the rights of the lodger and deprived him of his privileges under the Act of 1871. The consequence was that the plaintiff lost his right to the goods which he would otherwise have been entitled to. Here there was an illegal act on the part of the defendant by which the plaintiff suffered damage; he is therefore, as it seems to me, entitled to recover in this action the amount of damages which have been agreed upon.

Judgment for plaintiff.

Solicitors—H. R. Jones, for plaintiff; Fowle, for defendant.

1884. April 3. } INGLE *v.* MCCUTCHAN AND ANOTHER.

Solicitor—Bill of Costs—Signature—6 & 7 Vict. c. 73. s. 37—"Assignee."

An assignee of costs due to a solicitor signed and delivered a bill of the costs:—Held, *that such signature satisfied* 6 & 7 *Vict. c.* 73. *s.* 37, *as being signature by an "assignee" within the meaning of the section; which enacts that "no . . . . solicitor, nor any executor, administrator or assignee of any . . . . solicitor, shall" sue for costs "for any business done by such . . . . solicitor until . . . . one month after" delivery of a bill of such costs "subscribed with the proper hand of such . . . . solicitor, . . . or of the executor, administrator or assignee of such . . . . solicitor," or accompanied by a letter so subscribed.*

This was an appeal (by motion, pursuant to leave reserved under 20 & 21 Vict. c. clvii. s. 10) against a judgment of nonsuit, in the Mayor's Court of London, in an action whereby the plaintiff claimed the sum of 47*l.* 9*s.* 4*d.*, as the assignee in

writing of a bill of costs of that amount, for business done for the defendants by a solicitor named Kent. At the trial it appeared that no signed bill of costs had been delivered by Kent, and the plaintiff relied, for satisfying 6 & 7 Vict. c. 73. s. 37, upon a bill of costs which the plaintiff himself—after giving notice (on the 13th of October, 1883) to the defendants that the costs had been assigned to him—delivered (on the 23rd of October, 1883), accompanied by a letter subscribed by himself referring thereto. The assistant Judge held that the provisions of the Act as to delivery of a signed bill were not satisfied, and nonsuited the plaintiff accordingly.

Candy, for the plaintiff.—Signature by the plaintiff, the assignee of the debt, was signature by an "assignee" within the meaning of the Act, and therefore sufficient. The language of the Act in speaking of an "assignee" is general, and is not limited to any particular kind of assignee; and it is immaterial that at the time of the passing of the Act an assignee of a debt or other *chose in action* could not sue at law in his own name. Signature by an assignee of the debt was treated as sufficient in *Penley* v. *Anstruther* (1).

Cock, for the defendants.—The Act clearly meant by "assignee" only a person resembling a personal representative of a deceased person. In *Penley* v. *Anstruther* (1) the present point was not raised. The contention on behalf of the plaintiff implies that a solicitor has power to assign what he himself has no right to recover.

MANISTY, J.—This is an action brought to recover the amount of a bill of costs, due originally to one Kent, a solicitor, who had done business for the defendants, and who assigned his right to the costs to the plaintiff. No signed bill was ever delivered by Kent; and the bill relied on to satisfy 6 & 7 Vict. c. 73. s. 37, is a bill which the plaintiff signed and delivered. The question is whether the action is maintainable. I think it is.

In the first place I entertain no doubt that the fact of there having been no signed bill delivered by Kent did not prevent a debt being due from the defendants to Kent. The statute 6 & 7 Vict. c. 73. s. 37, only delays the enforcing of the right, and does not affect the right itself. Consequently there was, notwithstanding the non-delivery by Kent of any signed bill, a debt for Kent to assign. Next, had the plaintiff, being thus the assignee of the debt, power to deliver a bill of costs signed by himself? At the time of the passing of the statute an assignee of a debt could not sue for it in his own name, but he might even at law sue for it in the name of the assignor. Why should the statute, in allowing an "assignee" to sign, be held, not to extend to a simple assignee of the debt, but only to an assignee in bankruptcy or insolvency? Suppose the assignor of an unsigned bill of costs refuses to sign it, why should not the statute allow the assignee to sign it himself? What was the object of the statute? That is clearly shewn by *Engleheart* v. *Moore* (2). Baron Alderson there said the Legislature intended that the attorney should hold his hand for a month for the purpose of giving the client an opportunity of ascertaining whether the business had been done and the charges were reasonable. The object so defined is equally attained though the bill of costs be signed by an assignee of the costs instead of being signed by the solicitor himself. The client still gets all the protection which the enactment was designed to afford him. I think therefore that signature by the assignee of the costs satisfies the statute 6 & 7 Vict. c. 73. s. 37. Lastly, the Judicature Act, 1873, s. 25, sub-s. 6, empowers an assignee of a debt, or other legal *chose in action*, under certain conditions (which in this case are admitted to have been satisfied), to sue for it in his own name instead of using the name of the assignor. In my opinion, therefore, there is no valid ground of objection to the maintaining of this action. And, if authority is necessary, *Penley* v. *Anstruther* (1) is directly in point. Both on principle and authority I think the action is maintainable.

WILLIAMS, J.—I also am of opinion that the nonsuit must be set aside. The plaintiff is assignee of a bill of costs by

(1) 52 Law J. Rep. Chanc. 367.

(2) 15 Mee. & W. 548; 15 Law J. Rep. Exch. 312.

assignment from one Kent, under such circumstances that he is admittedly entitled under the Judicature Act, 1873, s. 25, sub-s. 6, to sue for the amount in his own name. But the defendant relies on the Act 6 & 7 Vict. c. 73. s. 37, which says that no solicitor, nor any executor, administrator or assignee of any solicitor, is to sue for costs for business done by the solicitor until one month after delivery of a bill of costs signed by "such . . . . solicitor or the executor, administrator or assignee of such . . . . solicitor." Mr. Cock, on behalf of the defendant, contends that the word "assignee" in that enactment cannot be read as extending to such an assignee as is here suing. It seems to me, however, that his contention places him in a dilemma: for if the plaintiff had no power to satisfy the statute by signing the bill himself, the statute cannot as to this bill be complied with at all; Kent cannot sign the bill, as being within the words "such solicitor," for he is not suing, and therefore is not "such solicitor." And Mr. Cock was driven to contend that a solicitor cannot effectually assign an unsigned bill of costs. I see no sufficient ground for so holding. It appears to me that both the language of the statute and the reasons on which the statute is founded are satisfied by the signature of an assignee by assignment under the Judicature Act, 1873, s. 25, sub-s. 6, no less than by the signature of an executor or administrator. And *Pemley* v. *Anstruther* (1), which is binding upon us, is an indistinguishable authority in favour of the plaintiff.

Decision reversed (3).

Solicitors—Thomas Ingle, plaintiff, in person; Rooks & Co., for defendant.

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(3) Leave to appeal was refused.

[IN THE COURT OF APPEAL.]

1884. Mar. 19, 26. ROBERTS AND OTHERS v. ROBERTS.*

Bill of Sale—Schedule—Specific Description of Goods in—Bills of Sale Amendment Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4 *and* 9—*Accordance of Bill of Sale with form in Schedule of Act.*

The Bills of Sale Amendment Act, 1882, *enacts by section* 4 *that every bill of sale shall have annexed thereto a schedule containing an inventory of the personal chattels comprised therein; that such bill of sale shall have effect only in respect of the chattels specifically described in the schedule, and shall be void except as against the grantor in respect of any personal chattels not so specifically described*:—Held, *that a schedule to a bill of sale which contained the description "Household furniture and effects, implements of husbandry," was insufficient to convey the goods so described, for that the schedule must contain such an inventory as is usual in business, separating the classes of articles comprised in it one from the other, although it need not contain a detailed description of each article.*

Appeal from the judgment of Stephen, J., at the trial of an interpleader issue.

The plaintiffs were the grantees of a bill of sale granted by T. Davies; the defendants were judgment creditors of Davies. The judgment creditors having issued a *fi. fa.*, an interpleader issue was directed.

The goods were ultimately sold, and realised 194*l.*, after deducting certain expenses and charges.

The bill of sale, on the construction of which the case turned, was made between T. Davies of the one part, E. Roberts, Henry Davies, and E. Edwards, of the other part. It recited that Roberts and H. Davies were liable as sureties for T. Davies on a bill of exchange which had been discounted; that H. Davies and E. Edwards were liable as sureties for T. Davies on another bill of exchange which had also been discounted; that T. Davies was unable to meet these bills, and also required a further sum of 45*l.*; that he had applied to the sureties to take up the bills

* *Coram* Brett, M.R., and Lindley, L.J.

and also to make him a further advance of 45*l.*; that they had agreed to do so "in consideration of the said T. Davies entering into these presents for the purpose of securing repayment to them with interest, as well of the said sum of 45*l.*, as also of the said two bills"; and the indenture witnessed "that in consideration of the sum of 45*l.* now paid to the grantor by them," and "of the covenant on the part of the grantees hereinafter contained," the grantor "doth hereby convey and assign unto the said grantees all the crops now growing, or which shall at any time hereafter during the continuance of this security be growing, upon" the named premises, "and also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools and utensils, hay, straw, consumable stores, live and dead stock, furniture and household effects, which now are, or at any time hereafter during the continuance of this security shall be, upon" the named premises, "all which said crops, stock, implements, furniture and effects are intended to be specifically described in the schedule hereunder written."

The schedule enumerated the live stock, and ended with the words "household furniture and effects, implements of husbandry."

The indenture did not contain any covenant by the grantees.

Stephen, J., held that all the goods seized were covered by the bill of sale, that the bill of sale was valid, and he gave judgment for the plaintiffs, the grantees of the bill of sale.

The defendants appealed.

Swetenham, *Q.C.*, and *C. Higgins*, for the appellants.

Frederick Marshall, for the plaintiffs.

Davis v. *Burton* (1), *Lazarus* v. *Anrade* (2), *Jones* v. *Harris* (3) and *Giles* v. *Melsom* (4) were cited.

(1) 52 Law J. Rep. Q.B. 636; Law Rep. 11 Q.B. D. 537.

(2) 49 Law J. Rep. C.P. 847; Law Rep. 5 C.P. D. 318.

(3) 41 Law J. Rep. Q.B. 6; Law Rep. 7 Q.B. 157.

(4) 42 Law J. Rep. C.P. 122; Law Rep. 6 H.L., E. & I. App. 24.

BRETT, M.R.—It has been urged that this bill of sale is void because the transaction was vitiated by fraud; but it seems to me that no fraud has been established. It was then urged that it was void, under section 8 of the Act of 1882, because it did not "truly set forth the consideration for which it was given." Now it seems to me that those words mean that if in fact the consideration is not accurately stated, then, even though it be an accident, still the bill of sale will be void; for the consideration must not be inaccurately stated, and the bill of sale must contain substantially the whole of the consideration. I am of opinion that in this case the true consideration has been stated in terms, although it is not stated quite in the form and order given in the schedule of the Act; but yet that it does appear sufficiently and is in substance correctly stated on the face of the bill of sale. It was next objected that the bill of sale did not comply with the form given in the schedule, because the words "by way of security" are not inserted in the operative part of the bill of sale. I think, however, that a bill of sale need not be drawn in the exact words of the schedule; but that, as I said in *Davis* v. *Burton* (1), every bill of sale must be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it. I repeat that, and I think that if there is any addition which makes the meaning of the bill of sale given different from the meaning of the form described in the schedule to the Act, then such a bill of sale would be inconsistent with the schedule. The answer, then, to this objection seems to me to be that the bill of sale does from its necessary construction substantially comply with the form given. Assuming, then, the bill of sale to be good, the question is whether it covers all the goods which have been seized under it. It seems to me that it covers all the goods properly described in it; but that it cannot include any goods "not specifically described" in the schedule, pursuant to the requirements of section 4 of the Act of 1882. This Act was passed with the intention of meeting a not uncommon mischief which arose upon well known instruments, and the Legislature intended

to put an end to the evils which arose from those general descriptions which specified no particular articles: so that it seems to me a specific description must mean such an inventory as is mentioned in the section and as is well known in business. Such an inventory would contain a specific description of each class of goods mentioned in it, although not a detailed description of each article contained in it. What the statute requires is, that amount of separation of one class of articles from another which any business inventory would give: so that any schedule which does not describe the things contained in it in such a way must be considered to be an unsatisfactory and insufficient schedule. With regard to the question raised as to the growing crops, we have no materials before us on which to form a judgment, and we can say nothing about it; but, in the result, our judgment must be in favour of the execution creditors for the sum of 45*l.*, and in favour of the grantees of the bill of sale for the difference between that sum and the sum of 194*l.*

LINDLEY, L.J.— I am also of opinion that there is no evidence of fraud in this case. It has been said that this bill of sale is void under the Act of 1882 because the consideration is not truly stated; but if the recitals are looked at they shew what the consideration really is. It was argued that, whereas the recitals speak of the "covenant hereinafter contained," no such covenant is found in the deed. That is, no doubt, the case, and it is an error. But the covenant does, in fact, arise from the recitals: so that the correction of the error is apparent on the face of the deed, and I do not think that the consideration can be said to be untruly stated within the meaning of section 8 of the Act of 1882. It was next said that the bill of sale was void under section 9 of the Act because it was not in accordance with the form given in the schedule, owing to the omission of the words "by way of security." It is true that these words are not found in the deed; but the recitals and the operative part of the deed shew that it was given by way of security: so that the objection is not fatal, and the bill of sale is not on that ground void. The next objection taken was, that the bill of sale was void because it does not follow the form given in the schedule, inasmuch as it comprises after-acquired property; but, on looking at the Act, I find a section specifically dealing with that subject. If the bill of sale contravenes the provisions of sections 8 and 9, it is void *in toto*; but section 5, which deals specifically with the subject of after-acquired property, enacts that a bill of sale shall be void, in respect of the matters dealt with in that section, except as against the grantor: so that there may be a bill of sale comprising after-acquired property, which may be valid as between the grantor and grantee, and yet be void as far as other persons are concerned; and it seems to me that this construction gives to both sections 4 and 5 their proper effect. The bill of sale, therefore, is good to a certain extent; but it is then argued that it is bad as regards the growing crops, because they were not separately assigned. But this objection depends, I think, on a misconception. Section 4 of the Act of 1878 says that the expression "personal chattels" shall mean growing crops when separately assigned, but not "growing crops when assigned together with any interest in the land on which they grow." Section 6 of the Act of 1882 says that a bill of sale shall not be void in respect of "any growing crops separately assigned or charged where such crops were growing at the time when the bill of sale was executed"— and that must mean separately assigned from the land on which they grow; so that section 7 of the Act of 1878, which enacts that no growing crops are to be deemed to be separately assigned "by reason only that they are assigned by separate words," only applies to cases in which the land is assigned as well. Another objection taken was, that the form given in the schedule of the Act of 1882 had been disregarded, and that the goods were not specifically described in the schedule. We must therefore consider what the meaning of those words is in this Act. Section 4 of the Act of 1882 says that, "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale." And section 9 says that

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"a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule": so that the effect of those two sections, taken together, is that the schedule must contain an inventory; and the question is, what sort of specific description will suffice, regard being had to the fact that there must be an inventory? A mere description of a species will not suffice; there must be such a description as business people would insert in an inventory. I think that one may say, by way of illustration, that a description, such as six chairs, would be sufficient without a description distinguishing each chair from the other; but a mere general description would not be enough, and I do not think that such a description as household furniture would be sufficient. I think, therefore, that this bill of sale must be considered void as against the execution creditor as far as it relates to those things which are not specifically described. I agree with the Master of the Rolls that we cannot give any judgment as to the growing crops, because the facts are not sufficiently before us; and I also agree that this judgment must be varied in the way in which he has stated.

Judgment accordingly.

Solicitors—Ullithorne, Currey & Villiers, agents for W. O. Edwards, Ruthin, for plaintiffs; H. Venn & Co., agents for Morris & Jones, Liverpool, for defendants.

1884. March 31. } THE MIDLAND RAILWAY COMPANY *v.* FREEMAN.

Contagious Diseases (Animals) Act—41 & 42 *Vict. c.* 74—*Prohibited District*—"*Causing the Movement*" *of Animals*—*Railway Company*—*Order in Council*—*Regulation of Local Authority.*

[For the report of the above case, see 53 Law J. Rep. M.C. 79.]

1884. March 5. } LEGGOTT *v.* WESTERN.

Practice—*Charging Order*—*Mode of enforcing*—1 & 2 *Vict. c.* 110. *ss.* 14 *and* 15—*Order XLVI. rule* 1—*Judicature Act*, 1873, *s.* 24.

An order charging a judgment debt on shares in a company, obtained under 1 & 2 *Vict. c.* 110, *cannot be enforced by a summary order in the action for the sale of the shares.*

Motion by the plaintiff, on notice to the defendant and the Æolus Waterspray and General Ventilating Company (Limited), for an order that the shares standing in the name of the defendant in the register of the company should be sold, and, if necessary for the purposes of such sale, the register rectified by the substitution of the name of the plaintiff as owner, and the proceeds paid into Court and applied in payment of 194*l.* 4*s.* 9*d.*, with which the shares stood charged by an order of the 11th of June, 1883.

On the 1st of May judgment was recovered in the action by the plaintiff. On the 9th of May the plaintiff obtained an *ex parte* order charging the shares of the defendant in the Æolus Waterspray and General Ventilating Company (Limited) with the judgment debt. On the 11th of June the order was made absolute.

K. Digby, for the plaintiff.—The charging order was obtained under Order XLVI. rule 1, applying 1 & 2 Vict. c. 110. ss. 14 and 15, to the Supreme Court. In virtue of section 24 of the Judicature Act, 1873, the order can be enforced by a further order for sale by the Court on motion in the action. The charge is an "equitable right appearing incidentally in the course of the cause" (sub-section 4), and the Court has power to grant (sub-section 7) "all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings

concerning any of such matters avoided." It was intended that all questions arising in the action should be determined in that action. He cited *Salt* v. *Cooper* (1), in which it was laid down by Jessel, M.R., that after final judgment a receiver may be appointed without the issue of a fresh writ, so long as the judgment remains unsatisfied.

Neither the defendant nor the company appeared.

LOPES, J.—I am of opinion that this application cannot be granted. We are asked to order the sale of shares charged by a charging order with a judgment debt. I think we have no power to do so. Section 14 of 1 & 2 Vict. c. 110 says, "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." It is clear that under those words separate proceedings are necessary to enforce the charge; but we are asked to enforce the charge without separate proceedings, in virtue of the Judicature Act, 1873, and particularly of section 24. In my opinion, however, the matter remains as it was before the Act.

CAVE, J.—I am of the same opinion. Under the Act 1 & 2 Vict. c. 110 the judgment creditor is entitled to all such remedies as if there had been a voluntary charge. It is contended that the effect of the Judicature Act, particularly of section 24, is to change the remedy. The Judicature Acts were passed to enable the High Court in each Division to give all the remedies which any of the Courts could have given under the previous system, and do not extend to enabling a foreclosure or sale to be ordered without regular proceedings for the purpose. There is no reference to charging orders in the Judicature Acts themselves; but by Order XLVI. rule 1, it is provided that "the effect of the order shall be such as is provided by the Acts 1 & 2 Vict. c. 110. ss. 14 and 15, and 3 & 4 Vict. c. 82. s. 1." Nothing is said as to any increased power of the Court, but the rule recognises the effect of charging orders, as produced by the 1 & 2 Vict. c. 110, and not as produced by that Act combined with the Judicature Act. In the course of the argument I asked why the Court should not equally enforce in the action a mortgage made to secure costs or compromise the action, and I received no satisfactory answer. If an order would be permissible in this case, it would be permissible in that, but there is nothing in the Judicature Act to permit it in either.

Motion dismissed.

(1) 50 Law J. Rep. Chanc. 529; Law Rep. 16 Ch. D. 584.

Solicitors—Parkers, for plaintiff.

[IN THE COURT OF APPEAL.]

1884. April 30. } ROBINSON AND ANOTHER v. TUCKER.*

Practice — Interpleader — Motion for New Trial in—To what Court made—Appeal from Final Judgment in—How brought—Rules of Court, 1883, *Order XL. rules* 3, 4 *and* 5; *Order LVII. rules* 11 *and* 13.

Where an interpleader issue is tried by a Judge and a jury, the Judge can, by Order LVII. rule 13, *finally dispose of the whole matter of the interpleader proceedings; and his judgment is final, unless leave to appeal is given. When in an interpleader issue a party desires to obtain a new trial, the application must be made to a Divisional Court. If in such a case it is desired to appeal from the final judgment of the Judge, leave must be obtained, and then that appeal lies to the Court of Appeal. If it is desired both to move for a new trial and to appeal from the final judgment of the Judge, then by Order XL. rule* 5 *both applications must be made, in interpleader as in other cases, in the first instance to a Divisional Court, from the judgment of which Court an appeal lies to the Court of Appeal.*

Burstall *v.* Bryant (Law Rep. 12 Q.B. D. 103) *overruled.*

Appeal from the judgment of the Queen's Bench Division.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

Robinson v. *Tucker, App.*

An interpleader issue was directed in which the plaintiffs were the claimants under a bill of sale and the defendant was the execution creditor.

The issue was tried before Williams, J., who left two questions to the jury, which they answered in favour of the plaintiffs. The learned Judge reserved the case for further consideration, and afterwards gave judgment for the plaintiffs, giving the defendant leave to appeal.

The defendant moved in the Queen's Bench Division for a new trial, on the ground that the Judge had misdirected the jury in not leaving the proper question to them, and also on the ground that the verdict was against the weight of evidence; he also appealed from the decision of the Judge given on further consideration, and gave notice of appeal to the Court of Appeal from that judgment, and further gave notice of motion to the Court of Appeal for a new trial.

The Queen's Bench Division dismissed the motion for a new trial, holding that, on the authority of *Burstall* v. *Bryant* (1), the motion should have been made to the Court of Appeal and not to the Divisional Court.

The defendant appealed.

Channell, for the defendant.

L. Smith, Q.C., and *Austin*, for the plaintiffs, contended that *Burstall* v. *Bryant* (1) was rightly decided, that the motion for a new trial could only be made to the Court of Appeal, and that the appeal should be dismissed.

The Common Law Procedure Act, 1860, s. 17, *Witt* v. *Parker* (2), Rules of Court, 1883, Order XL. rules 3, 4 and 5 (3), and Order LVII. rules 11 and 13 (4), were referred to.

BRETT, M.R.—Where interpleader proceedings are instituted there are at the beginning of such proceedings three parties—the claimant and two other parties—one of whom desires to interplead, in consequence of which an interpleader summons is taken out at chambers. When this is done, the Judge sitting at chambers can deal with the summons there, and can make an order which will affect all the three parties. If he does that, then the order was, under the provisions of the Common Law Procedure Act, final and conclusive, and no appeal could be brought; and similarly, under the Rules of Court, 1883, the decision of the Court or a Judge in a summary way is final and conclusive, unless by special leave. The Judge at chambers may, however, direct an issue; if he does so he then settles the issue, and that issue may go for trial before a Judge and a jury, so as to get a decision on the issue; and if no fault is found with the proceedings at the trial, then, under the old practice, the issue when found was returned to chambers, where the Judge considered the issue, applied it to all the facts of the case, and made a final order, which was called a judgment, and which bound all the three parties. From that judgment there was, under the old law, no

(1) Law Rep. 12 Q.B. D. 103.

(2) 46 Law J. Rep. Q.B. 450.

(3) Rules of Court, 1883, Order XL. rule 3: "Where, at or after a trial with a jury, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason that the finding of the jury upon the question submitted to them has not been properly entered."

Rule 4: "Where, at or after a trial by a Judge, either with or without a jury, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, on the ground that, upon the finding as entered, the judgment so directed is wrong."

Rule 5: "An application under rules 3 and 4 of this order shall be to the Court of Appeal, unless where there has been a trial with a jury there is also a motion for a new trial, in which case it shall be to the Divisional Court, by which such motion shall be heard."

(4) Rules of Court, 1883, Order LVII. rule 11: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under rule 8 of this order, shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal."

Rule 13: "Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for."

appeal, unless some exception was taken to the mode in which the trial of the issue was conducted, in which case there could always be a motion for a new trial. Under the Rules of Court of 1883, however, there may be an appeal if leave is given.

It seems to me that the same things may constitute a miscarriage in the trial of an interpleader issue as would have that effect in other cases. There may, for instance, be misdirection; the verdict may be against the weight of evidence, or the wrong question may be left to the jury. If a Judge puts certain specific questions to the jury, to which they give answers, and on the answers given by them to those questions he directs the jury how their verdict ought to be given, then, if in so doing he makes a mistake, that is misdirection, for which a remedy exists in the case of an interpleader issue as in other cases; so that a motion for a new trial in an interpleader issue proceeds on the same lines as in other cases. It does not matter whether formerly there was or was not an appeal from the judgment of the Court in Banc to the Exchequer Chamber, as since the Judicature Act there is no doubt but that an appeal lies to this Court from the decision of the Divisional Court in such a matter.

Order LVII. of the Rules of Court, 1883, says by rule 13 that Order XXXVI., which is an order referring to the trial of actions, shall, with the necessary modifications, apply to an interpleader issue, and it also provides that the Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings. So that the Judge can now give at the trial that judgment which formerly had to be given at chambers. This being the procedure under the existing Rules of Court, it has been urged that, if the Judge does so give judgment at the trial, there can be no appeal without leave from a miscarriage during the trial, even though a miscarriage of justice takes place in the finding of the issue at the trial. To hold that would be, as it seems to me, to decide that injustice cannot be remedied. The fact is that the proceeding at the trial of an interpleader issue is, under the Rules of Court, a twofold proceeding. The Judge tries the issue which has been directed, and then he, as a separate act, may finally dispose of the whole matter of the interpleader proceedings. When, where an issue is tried by a Judge and jury, fault is found with the manner in which the Judge has left or put the case to the jury, or with the finding of the jury, regard being had to the evidence, then the application for the purpose of correcting the miscarriage which it is alleged has taken place must be made to the Divisional Court. But it may also be alleged that the Judge, in finally disposing of the interpleader proceedings, has made a mistake and has given a wrong judgment, and in such a case there may be, if the Judge gives leave, an appeal, and that appeal lies to this Court; so that there may be two proceedings in the nature of an appeal in respect of the same interpleader issue, one of which would be to the Divisional Court, and the other to the Court of Appeal. This difficulty was foreseen, and in order to prevent its occurrence rule 5 of Order XL. was passed, which, with rules 3 and 4 of the same order, provides that, if a party desires both to object to the judgment of the Judge and also to move for a new trial, then both the applications are to be made to the Divisional Court; and, as I have said, the proceedings in this respect upon an interpleader issue are the same as those in other cases; so that, whereas in this case there are two grounds of complaint in respect of the trial of an interpleader issue, in one of which the application is to the Divisional Court, and the other, if leave is given by the Judge, to this Court, then, by the operation of Order XL., both applications must be made in the first instance to the Divisional Court, and then from the order of that Court an appeal can, under the Judicature Act, be brought to this Court.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I am of the same opinion. There may be two elements in the trial of an interpleader issue before a Judge and a jury, in respect of each of which an application may be made by a dissatisfied party. As to the first element, the application must be to the Divisional Court under

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the provisions of Order XXXIX. rule 1. As to the second element—that is, the final judgment of the Judge disposing of the whole matter—from that there can be no appeal without leave; but when leave has been given, then the case is in the same position as the judgment in any ordinary action.

Order XL. rule 5 applies to proceedings in interpleader as well as to other actions, and therefore, in such a case as this, both the applications must be made, in the first instance, to the Divisional Court.

[The appeal was then heard on the merits, and was dismissed.]

Solicitors—Walker, Belward & Whitfield, for plaintiffs; Owles & Collinson, for defendant.

1884. March 11. *Ex parte* POULTON AND SON; *in re* THE COPYRIGHT ACTS, 5 & 6 *Vict. c.* 45, *and* 25 & 26 *Vict. c.* 68.

*Copyright—Register—Rectification—*5 & 6 *Vict. c.* 45. *s.* 14*—Person deeming himself "aggrieved" by any Entry—Person prejudiced by his own Entry.*

Under 5 & 6 *Vict. c.* 45. *s.* 14, *which gives power to make an order to vary an entry in the register of copyright under that Act upon the application of any person who "shall deem himself aggrieved by any" such "entry," the Court made an order varying an entry in a register of copyright upon the application of the person who had caused the entry to be made.*

This was a motion for an order to vary certain entries in the register of proprietors of copyright in paintings, drawings and photographs, an affidavit in support of the motion stating, in substance, as follows:—

The applicants, a firm of photographers, in May, 1883, caused to be registered at Stationers' Hall three photographs. In each case under the heading of "Author" the entry is "Poulton & Son, Lee, Kent." The applicants are advised that, owing to the decision of the Court of Appeal in *Nottage* v. *Jackson* (1), this entry is incorrect, and are desirous of amending the same by substituting the words "William John Carroll, 5 Taunton Road, Lee, Kent," under the heading of "Author," in lieu of the words "Poulton & Son, Lee, Kent." The said William John Carroll is a photographic operator, who was at the time of first taking the said photographs, and still is, in the employment of the applicants at a weekly salary. He actually took the said photographs, and the applicants are advised and believe that he is the author thereof according to the decision in *Nottage* v. *Jackson* (1); and they are further advised that they are properly registered as proprietors of the said photographs, the same having been made or executed for them or on their behalf for a valuable consideration—namely, the weekly salary paid by them to him.

Shortt, for the applicants, and also for Carroll.—A liberal interpretation should be given to the word "aggrieved" in 5 & 6 Vict. c. 45. s. 14, which is incorporated by the Art Copyright Act.

[WILLIAMS, J.—I have already, in a case which has not, I think, been reported, been a party to the making of a similar order under that section.]

The Court (2) granted an order to vary the entries in the manner desired, without prejudice to prior transactions.

Order accordingly.

Solicitors—Neish & Howell, for applicants.

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(1) 52 Law J. Rep. Q.B. 760; Law Rep. 11 Q.B. D. 627.

(2) Denman, J., and Williams, J.

1884. Jan. 17. } PONTIFEX *v.* FOORD.

Practice—Rules of Supreme Court, 1883 *—Third Party—Contribution or Indemnity—Landlord and Tenant—Order XVI. rules* 48 *and* 52.

In an action for breach of a covenant to repair, the defendant, the lessee, sought to bring his sub-lessee as a third party. The covenants in the original lease and in the sub-lease were identical, but there was an interval of eight years between the two leases, and there was no reference in the sub-lease to the original lease:—Held, *on a summons for directions under Order XVI. rule* 52, *that the right of the defendant against the third party was not a right to "contribution or indemnity" within the meaning of Order XVI. rule* 48.

This was an appeal from the decision of Field, J., at chambers, refusing to give directions under Order XVI. rule 52 (1), for the trial of questions between the defendant and the third party, who had appeared after service of a notice allowed by the Divisional Court, on appeal from the Judge at chambers, to be served on him.

The action was on a covenant to repair contained in a lease between the defendant and the plaintiff of certain premises for a term of twenty years commencing Michaelmas, 1861. The defendant had sub-let the premises, as and from 1869, to one Mead, for the rest of his term less ten days; and the sub-lease contained covenants as to repairs identical with those in the original lease, but there was no actual reference to the original lease in the under-lease.

W. J. Brooks, for the defendant.—Though the sub-lease does not contain any indemnity clause, yet the covenants therein are identical with those in the lease; and, that being so, there is practically a covenant to indemnify—*Hornby* v. *Cardwell* (2).

It may be that the measure of damages differs in the two cases, though the words are identical; yet, even so, the defendant might recover from the third party. It is true that the new rule is not so wide as the old rule, but it was not intended to limit the right to bring in a third party to cases in which "contribution or indemnity," in the narrowest sense of those words, can be claimed. This is eminently a case in which the claim against the third party should be tried with the question between the plaintiff and defendant, and the object of this third-party procedure is to prevent the delay and inconvenience of two trials and possibly two different verdicts. This result is to be avoided—*Benecke* v. *Frost* (3). Taken in their common-sense meaning, the words "contribution or indemnity" would cover a case of this kind.

Aspland, for the third party.—The decision of Field, J., is not inconsistent with that of the Divisional Court. The Divisional Court only decided, without the third party being heard, that there was a *prima facie* case for giving notice to the third party. Field, J., has, after hearing the third party, decided that there is no "contribution or indemnity" within the rule; and that decision, it is submitted, was right, for "contribution" is confined to cases of co-sureties or joint contractors, whereas here the contracts are independent. The evidence in support of each claim for damages would be different; the covenants are in their effect different—in the one case, for instance, there is a covenant to leave in as good a state of repair as 1861; in the other, the state of repair in which the premises are

(1) Order XVI. rule 48: "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third-party notice) to that effect. . . ."

Rule 52: "If a third party appears pursuant to the third-party notice, the defendant giving the notice may apply to the Court or a Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability as between the third party and the defendant giving the notice to be tried. . . ."

(2) 51 Law J. Rep. Q.B. 89; Law Rep. 8 Q.B. D. 329.

(3) 45 Law J. Rep. Q.B. 693; Law Rep. 1 Q.B. D. 419.

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to be left is that in which they were in 1869, and there is not, as in *Hornby* v. *Cardwell* (2), a reference in the second lease to the first. There is no right to "indemnity"—*Logan* v. *Hall* (4).

Muir MacKenzie, for the plaintiff, was not called on.

POLLOCK, B.—It is necessary for the purposes of deciding this case to note the difference between the wording of this new rule and that of the old rule. That difference is in fact the omission of the words "or any other remedy or relief over against the third party," which were found to give rise to many practical difficulties in working, and the new rule was passed to limit the right to serve a third-party notice to cases of contribution or indemnity only. In this case leave to issue and serve such a notice was given, but when the summons for directions was heard, the learned Judge was not "satisfied that there" was "a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed in whole or in part." Those words "in whole or in part" do not alter the meaning of the words "contribution or indemnity." The claim must be for contribution or indemnity, although it may be a claim to contribution or indemnity as to the whole or only a part of the plaintiff's claim against the defendant. But it was contended that here there was an indemnity, and the case of *Hornby* v. *Cardwell* (2) was relied on; but there was in the second contract in that case a distinct reference to the first contract, and that was held to be equivalent to an indemnity. But there is nothing of that kind in this case. It is well known that a surveyor, if called in to assess the amount of repairs to be done under such contracts as these two, would enquire into the age and character of the house when the tenancies respectively commenced, and the cases of *Payne* v. *Haine* (5) and *Logan* v. *Hall* (4) shew that similarly worded covenants vary in effect as regards old or new houses. I therefore think there is no liability to contribution or indemnity, and this appeal must be dismissed. And in dismissing this appeal, we do not quarrel with the decision of the Divisional Court. They only decided that the third party ought to be summoned. We think that Mr. Justice Field was right in deciding when they were summoned not to direct a trial of the question of their liability to contribute or indemnify the defendant, not being satisfied that there was a question proper to be tried.

LOPES, J., concurred.

(4) 4 Com. B. Rep. 598; 16 Law J. Rep. C.P. 252.

(5) 16 Mee. & W. 541.

Solicitors—Pontifex, Hewitt & Pitt, for plaintiff; E. W. Reeves, agent for Sedgwick, Turner & Walker, Watford, for defendant; Young & Sons, for third party.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1884. May 1, 7. } SPELLER *v.* THE BRISTOL STEAM NAVIGATION COMPANY.*

Practice—Service out of the Jurisdiction—Third-Party Notice—Person domiciled or ordinarily resident in Scotland or Ireland—Order XI. rule 1 (*g*)—*Indemnity—Order XVI. rule* 48.

The issue of a third-party notice for service out of the jurisdiction under Order XI. rule 1, *on a person domiciled or ordinarily resident in Scotland or Ireland will not be allowed.*

Lenders *v.* Anderson (*ante*, p. 104; Law Rep. 12 Q.B. D. 50) *followed.*

Clause (*g*) *of that rule has no application to third-party notices.*

Per the Court of Appeal.—Leave to serve a third-party notice will not be given where a defendant claims to be entitled to indemnity over against a third party under Order XVI. rule 48, *except where there is a contract express or implied on the part of such third party to indemnify the defendant.*

Ex parte application to the Divisional Court to allow the defendant to issue a

* *Coram* Grove, J., and Huddleston, B., in the Queen's Bench Division, and Brett, M.R., Bowen, L.J., and Fry, L. J., in the Court of Appeal.

third-party notice to a person domiciled in Scotland.

An action for breach of contract was brought by the plaintiff, to recover for damage to a cargo of sugar caused by the alleged unseaworthiness of the ship in which it was carried by the defendants under their contract for delivery at Bristol. It was stated that the defendants had hired the ship from the owner Aitkin, under a charter-party, by which he had covenanted that the ship was seaworthy, and had undertaken to keep her seaworthy during the period for which the charter-party ran. The defendants applied at chambers for leave to issue a third-party notice to Aitkin, under Order XVI. rule 48 (1), stating that they claimed to be entitled to indemnity over against him. Aitkin was a Scotchman domiciled and resident in Scotland, and Mathew, J., at chambers, refused the application, holding that the defendants were not entitled to leave to issue the notice, and that the application was not warranted under Order XI. rule 1 (*g*) (2).

Bucknill, for the defendants, moved *ex parte*.—The indemnity claimed by the defendants is within Order XVI. rule 48 (1), and the service out of the jurisdiction is warranted by Order XI. rule 1 (*g*) (2). *Lenders* v. *Anderson* (3) only deals with clause (*e*) of that rule. In *Lightowler* v. *Lightowler* (4), where one of the defendant partners resided within the jurisdiction, Butt, J., at chambers, allowed service of a writ on another of the defendant partners out of the jurisdiction, on the ground that, as the action was in respect of a partnership agreement, the partner residing out of the jurisdiction was a necessary and proper party to the action.

[HUDDLESTON, B.—Order XI. rule 1 must be read with rule 2.]

There is no concurrent remedy in the present case, therefore rule 2 can be omitted, and the application depends on rule 1 (*g*), which, being new, was framed for some purpose and not for the purposes of rule 1 (*e*).

GROVE, J.—I do not think this point is free from difficulty; but clearly we should arrive at an extraordinary result if we held that a third-party notice could be served on a person domiciled and resident in Scotland when it has been held that service of a writ of summons would not in such a case be allowed. The defendants claim indemnity over against the owner of the ship, and before the Judicature Act two separate actions would have had to be brought for this purpose. In the present case it happens that the owner could not have been sued—*Lenders* v. *Anderson* (3); but by bringing him in as a third party to the original action he would in fact be sued. It seems to me to be an extravagant proposal, and one which, if acceded to, would get rid of that decision. My opinion is that, "a necessary or proper party to an action brought against some other person duly served within the jurisdiction" (Order XI. rule 1 (*g*),) does not mean any party who may be brought in collaterally, but a person against whom the immediate action is brought. Here the action is brought against the defendants, but it does not appear that the person whom it is sought to bring in as a third party is sued.

Another objection to this application is, that Order XI. rule 2, which evidently applies to the preceding rule and subsections, contemplates cases where a concurrent remedy in Scotland or Ireland exists, and it is admitted there is no concurrent remedy in the present case. My opinion is that the *ratio decidendi* of *Lenders* v. *Anderson* (3) applies to the

(1) Order XVI. rule 48: "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third-party notice) to that effect. . . ."

(2) Order XI. rule 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever

"(*e*) The action is founded on any breach or alleged breach, within the jurisdiction, of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(3) *Ante*, p. 104; Law Rep. 12 Q.B. D. 50.

(4) Law J. W. N. 1884, p. 18; Law Rep. W. N. 1884, p. 8.

present case, and that Aitkin is not a "necessary or proper party to the action"; if he was, he is within the decision of *Lenders* v. *Anderson* (3), and could not be served with a writ of summons. It was said that Aitkin would not be injured by the issue of the third-party notice; but with that I do not agree, for if he does not enter an appearance he is to be deemed to admit the validity of any judgment obtained against the defendants, and his own liability to contribute or indemnify to the extent claimed in the notice. If on the other hand he does enter an appearance, he is practically sued in this country—see Order XVI. rule 49. We should be controverting the intention of the Act if we held that a third-party notice might be served on a person resident in Scotland or Ireland when a writ of summons could not be served.

HUDDLESTON, B.—I am of the same opinion. This is a novel application under Order XI. to serve a notice out of the jurisdiction. Formerly the Court of Chancery had a discretion to issue service out of the jurisdiction, but it has been decided that the old practice no longer exists—*In re Eager* (5)—and leave to serve out of the jurisdiction can only be given in cases within Order XI. rule 1—see *per* Jessel, M.R., in that case, as reported in the *Law Journal Reports*. It has been decided that no service of a writ of summons will be allowed out of the jurisdiction in Scotland or in Ireland: consequently, a resident in either of those countries must be sued there and not in England—*Lenders* v. *Anderson* (3). We are now asked to allow a third-party notice to be served on a resident in Scotland, and the question is, Is Aitkin "a necessary or proper party to the action" within Order XI. (*g*)? It is clear he is not a necessary party to the action, nor do I think he is a proper party to the action between the present plaintiff and defendant. He can, if he chooses, come in and defend, or if he takes no notice of the action he may be bound; but in no sense is he a necessary or proper party to the action. I am therefore of opinion that Order XI. rule 1 (*g*) (2) is not applicable to third-party notices, and that the defendants are not entitled to issue such a notice to a person resident in Scotland or Ireland.

(5) 52 Law J. Rep. Chanc. 56; Law Rep. 22 Ch. D. 86.

The defendants, on May 7, appealed against this decision.

Gaskell, for the defendants.—The defendants are entitled under Order XVI. rule 48 (1) to indemnity over against the third party, who is the owner of the ship chartered by them. The present rule 48 differs from the corresponding rule—Order XVI. rule 17—of the annulled Rules of Court, 1875, in that the words "or any other remedy or relief" have been omitted after the word "indemnity," which ought, however, to be so construed as to include such a claim as the present one. Moreover, the damages claimed by the defendants from the third party are the same as those claimed by the plaintiff from the defendants.

Pontifex v. *Foord* (6) was referred to.

BRETT, M.R.—With regard to the reason why the old rule (7) was altered, I do not express any opinion, as I had not the opportunity of considering it in the same way as the members of the Rule Committee had. The old rule provided that a third party might be served with a notice where the defendant claimed to be entitled to "contribution or indemnity, or to any other remedy or relief, over against any person not a party to the action." What is the meaning of the word "indemnity" in that rule? There can be no right to indemnity except by virtue of a contract express or implied. In order, therefore, to bring a case within the word "indemnity" in the old rule, it must have been shewn that the third party had contracted expressly or impliedly to indemnify the defendant. It is also true that under that rule power was given under the words "any other remedy or relief" to bring in a third party who was not bound either to contribute or to indemnify. But in the present rule—Order XVI. rule 48—the words are "contribution or indemnity," and they seem to me to have precisely the same meaning as they

(6) *Ante*, p. 321; Law Rep. 12 Q.B. D. 152.
(7) Rules of the Supreme Court, 1875, Order XVI. rule 17.

had in the old rule. If that be so, the word "indemnity," which is the only thing we have now to deal with, means where a third party has contracted either expressly or impliedly to indemnify the defendant. But here there is no such contract if the decision in *Pontifex* v. *Foord* (6) is right, inasmuch as the shipowner, when he chartered his ship to the defendants, must have anticipated that the defendants intended to charter it again. It is a mere accident if the damages which the shipowner would have to pay under his warranty that the ship was seaworthy are the same as those which the cargo-owner will if his case is true obtain against the defendants. The damages probably would be the same, but as to that I give no opinion. The fact of the damages being the same is not enough; there must be a contract to indemnify. The present case would not have come within the word "indemnity" in the old rule, because there is no such contract, but would have come under the words "or any other remedy or relief." The defendants, however, cannot avail themselves of these words, because they have been omitted from the present rule—Order XVI. rule 48; and as the case is not within the word "indemnity," they have no right to make the suggested third party a party to the action. If Aitkin cannot be served with a third-party notice in England, it follows that he cannot be served with such a notice in Scotland. I think that Mr. Baron Pollock in *Pontifex* v. *Foord* (6) put the right construction upon rule 48 of Order XVI.

BOWEN, L.J.—I am of the same opinion. I think that the decision of Mr. Baron Pollock in *Pontifex* v. *Foord* (6) is right. Under the old rule a wide power was given to a defendant to bring in a person against whom he claimed relief or remedy, but, as that was found to work an inconvenience, the rule was altered. Under the present rule 48 a defendant can only bring in a third party if he claims to be entitled to contribution or indemnity. But the defendants, as against Aitkin, the owner of the vessel, have no claim to contribution, nor have they any claim to indemnity as such, because there is no contract by him to indemnify them. The damages which the defendants may recover against Aitkin are probably much the same as those which the plaintiff will recover against the defendants; but that is only an accident, and does not convert either contract into a contract of indemnity.

FRY, L.J.—I am of the same opinion. It appears to me that the present claim is not a legal claim for damages. It was contended that the word "indemnity" ought to have a wide construction given to it, so as to include every case in which the measure of damages is the same. I think that contention is wrong, and that we must give to the word "indemnity" its legal signification and no more.

Appeal dismissed.

Solicitors—Lowless & Co., for defendants.

1884. March 13, 14. LAST (*surveyor of taxes*) (*appellant*) *v.* THE LONDON ASSURANCE CORPORATION (*respondents*).

Revenue—Income Tax—Marine, Fire, and Life Insurance—Life Policy Holders—Premiums—Duty on Bonus Fund—Gains and Profits.

The respondents were an insurance company, and carried on three branches of business—namely, marine, fire, and life insurance—under one management. The results of the business in the three departments were thrown together into one account, called the "profit and loss account," and dividends were declared out of the balance of this account, and not out of the profits made in the particular departments. The respondents' liabilities were discharged partly out of premiums and partly out of income arising from invested funds, which in the management of this business were allocated to the marine, fire, and life departments, and were known as the marine, fire, and life funds:—Held, *that, for the purposes of assessment to income tax, the business of the company, being substantially*

Last v. *London Assurance Corporation.*

one business, was to be dealt with as a whole and not as three separate businesses. Held, *further, that additions made by the respondents to the life fund out of annual income were not liable to income tax as gains or profits.*

The respondents in the life department issued policies of a participating character, which were issued at premiums calculated to cover, not only all risk and expense, but also to yield a considerable surplus over and above company profits, two-thirds of which were by the terms of the policies to be apportioned among the policy holders, and the remaining one-third was to be applicable for the benefit of the company. This surplus was determined quinquennially by ascertaining actual results and calculating contingencies, and the two-thirds distributable to participating policy holders made up a fund which was distributed either in cash payments or by way of reduction of premiums or by addition to the amounts insured:—Held, *by* DAY, J. (*dissentiente* SMITH, J.), *that the fund appropriated for distribution by way of bonus among policy holders did not constitute gains or profits to the respondents so as to be assessable to income tax.*

This was a Case stated by the Income Tax Commissioners for the City of London under 37 Vict. c. 16. s. 9.

At a meeting of the commissioners the respondents appealed against an assessment made upon them under Schedule D of the Income Tax Acts, 1879, in the sum of 40,797*l.*, in respect of the profits of the marine and fire branches only, the life branch being entirely disregarded.

The respondents are a corporation incorporated by royal charter, having a common seal and one body of shareholders, with a paid-up capital of 448,275*l.* The central office of the respondent company is in London, where three branches of business are carried on—namely, marine, fire and life insurance—all managed by the same directorate. The results of the business in the three departments are thrown into one account, called the "profit and loss account," and dividends are declared out of the balance of this account, and not out of profits made in the particular departments. The liabilities of the respondents to policy holders are discharged partly out of premiums, partly out of the income arising from large invested funds, which in the management of their business are allocated to the marine, fire and life funds. The life fund is much the largest of these investments. Income tax is deducted from the greater part of the income arising from these respective funds before payment thereof to the respondents.

By a matter of account the funds are thus divided:—

(*a*) Paid-up capital.

(*b*) General reserve fund, including balance of profit and loss account.

(*c*) Marine fund.

(*d*) Fire fund.

(*e*) Life fund.

The income arising from the interest and dividends in the marine, fire and life funds, on an average of the last three years, and from which income tax has been deducted, has been as follows:—

	£	s.	d.
Marine and fire . .	7,304	3	10
Life	76,850	12	0
	£84,154	15	10

The respondents have therefore paid income tax on 84,154*l.* 15*s.* 10*d.* in respect of these funds. The profits of the respondents are derived from the following sources:—

(1) Interest on paid-up capital and reserve fund.

(2) Profit on marine business.

(3) Profit on fire business.

(4) Profit on life business.

Respecting the profits derived from the interest on the paid-up capital and reserve fund no question arises. They are not included in the return because income tax is levied and paid by deduction from the interest and dividends of the investments of these funds.

As regards the other three sources of profits available for division among the shareholders, the respondents contended that the results of the three branches, marine, fire and life, should be thrown into one general account, and that no distinction should be made between the life branch of its business and the other two; and that if and in so far as the total sum on which they pay income tax in respect of these

investments exceeds the sum total of the profits they make, they are not liable to be assessed under schedule D; that in making up the amount of the life profit to be entered in the return for purposes of income tax, the amount to be so entered must be the profit, and no more than the profit, available for division among the shareholders; and that the gross profits so arrived at on an average of the last three years had been as follows, namely:—

	£	s.	d.
Marine	27,635	11	9
	75,766	19	5
	27,454	9	5
	£130,857	0	7
Deduct expenses .	57,597	10	0
	£73,259	10	7

The net profits being 73,259*l.* 10*s.* 7*d.*, and the respondents having paid income tax on 84,154*l.* 15*s.* 10*d.*, or on 10,895*l.* 5*s.* 3*d.* more than the sum available to it for profits, the respondents maintained that the assessment was wholly wrong and should be discharged.

The appellant, on behalf of the Crown, contended as follows:—That life insurance, from its peculiar nature, does not fall within the scope of the Income Tax Acts except as to the interest from the capital invested in securities; that the profit earned by any life insurance society is derived solely from their investments of capital, and that is notably so in the case of the respondents; that this interest is either taxed by deduction at its source, or, when received in full without such deduction, is chargeable as interest on the full amount received, under the 4th and 5th cases of schedule D; that this being so, there was nothing to take into account either in the way of profit or loss in connection with the life branch beyond the amount of the untaxed interest.

The appellant further urged on behalf of the Crown that, assuming the respondents to be right in their contention that the life branch as well as the marine and fire branches were to be brought into the account, the assessable profits of the life branch were not to be determined merely by the amount of profit available for division among the shareholders, but would require to be found according to the 3rd rule of the 1st case of schedule D; that over and above the profit so appropriated to the shareholders, the respondents' printed accounts shewed—first, sums paid to policy holders in the shape of bonuses, which was a distribution of assessable income or revenue; secondly, additions made to the life fund, which was a transfer of income to capital; that to arrive at the net balance of profit chargeable for the life branch under the above rule it was required on the one hand to take account of the life premiums received during the last three years, and, on the other, to allow as deductions nothing beyond the claims actually paid under policies becoming payable in the same period, together with the expenses of managing the business, and that the balance remaining would be the profit chargeable to the income tax for the life branch, and that the profit, added to the untaxed profit of the marine and fire branches, would represent the total liability of the respondents under schedule D.

In reply to this alternative contention of the appellant, the respondents made the following statement:—In the life branch of the respondents' business there are three classes of policies, called the "old," the "1831," and the "1846" series. The three classes are worked independently. As regards the "old" series, any surplus which remains after payment of policies belongs to the respondents for payment of expenses and profits. As regards the "1831" and "1846" series, by the terms of the contract with the assured, the surplus which remains after payment of policies is dealt with as follows: two-thirds of the surplus are returned to the assured, who receive payment either by way of bonus or by abatement of premium, and the remaining third of the surplus goes to the respondents, who bear the whole of the expenses of the business. The portion that remains after payment of expenses constitutes the only profit of the respondents available for division among the shareholders.

The commissioners held that the claim of the respondents to be taxed in respect of the profits of the three branches, life, fire, and marine, must be allowed; and as it appeared that the taxed investments exceeded the profits of the three branches (as

arrived at by the respondents), discharged the assessment.

The question for the opinion of the Court was whether or not for the purposes of assessment to income tax the respondents were to be dealt with as a single corporation, the income tax payable by it being determined with regard to its operation as a whole; and upon what principle the profits of the life branch should be calculated.

The Attorney-General (with him *The Solicitor-General* and *Dicey*), for the appellant. — It is contended in the first place that the fund distributed by way of bonus among the policy holders constitutes gains and profits within 16 & 17 Vict. c. 34, so as to be liable to be assessed to the income tax. These bonuses are so much profit and gain acquired by the company; they are so much money earned and given to the policy holders. The profits out of which the bonuses are paid are ascertained at the end of a quinquennial period, and the surplus which is available constitutes the profits of the company. The Crown has nothing to do with the distribution of these profits, whether they go to policy holders in the shape of bonuses or to the shareholders; all that the Crown is concerned with is to ascertain the profit which has been earned under schedule D. It is no answer to say that, by the terms of the contract between the respondents and their policy holders, the latter are made to pay a higher premium in consideration of their becoming entitled to so much profit; it is none the less a profit in respect of which income tax must be paid, exactly as if the policy holder were in the position of an ordinary shareholder — *The Mersey Docks and Harbour Board* v. *Lucas* (1).

[DAY, J.—May it not be regarded as a return of excessive premium which has been paid?]

It is contended that the premiums went towards making the profits, which may or may not exist, according to circumstances.

Secondly, assuming that there is no liability on the part of the respondents to pay duty upon the bonus fund, the company has no right to deduct the whole expenses; the only deduction which they are entitled to make is so much of the expenses as are necessarily incurred to realise what represent the profits.

Thirdly, the additions to the life fund, which are in fact a transfer of income to capital, are liable to income tax as profits arising from the undertaking. At first glance it might seem as if these additions only created a fund to meet liabilities that might afterwards accrue upon policies effected, and therefore could not be considered as profits. But the decision in *The Imperial Fire Insurance Company* v. *Wilson* (2) establishes the principle that, inasmuch as this insurance fund will be paid out eventually, and inasmuch as you do not pay income tax when you pay it out, the proper mode of estimating the profits is to take the difference between the receipts and payments in each year.

[DAY, J.—That was a fire insurance. Fire risks run off at the end of a year, and where the risk all runs off at the end of the year the difference between the actual receipts and payments sufficiently represents the profits for income tax purposes. In a life policy the premium must be kept in hand as a life fund, otherwise when the policy holder became an old man, assuming the insurance to continue, there would not be sufficient funds to meet the liability.]

Fourthly, it is contended that the business of the respondents is constituted of separate businesses, and should be dealt with as such, and not lumped together. The marine and fire branches are in fact separate businesses, and the profits arising from them should be so treated. The provisions of 33 & 34 Vict. c. 61. s. 4, require separate accounts of life funds to be kept in cases where other business is transacted besides that of life insurance.

Sir Hardinge Giffard, Q.C., *Arthur Charles, Q.C.*, and *Chalmers*, for the respondents.—This is one trading concern, and a company, like an individual, is to be taxed upon the basis of profits. The unity of the thing taxed involves the whole proposition. A horse-dealer may also carry on the business of a corn-chandler, but he would only be liable to income tax on the

(1) *Ante* (H.L.), p. 4; Law Rep. 8 App. Cas. 891.

(2) 35 Law Times, 271.

profits of the business regarded as a whole. A more difficult question is that which has reference to the principles upon which the profits of a life insurance business are to be ascertained. In considering this it must not be forgotten that there is a wide difference between fire and life policies. A fire policy runs out at the end of each year, and the risk insured against may never occur, and though such policy may be renewed it is in effect a new contract. In a life policy the sum insured must some time or other be paid, unless the policy itself is allowed to drop. The principle laid down in *The Imperial Fire Insurance Company* v. *Wilson* (2) has therefore no application to the present case. The premiums received cannot be considered as ascertained profits; they are one of the sources by means of which, aided by investments, the representatives of insurers will have to be repaid what will ultimately be due to them. These premiums are like moneys lent to a banker which will at some time or other have to be repaid.

Again, the sums payable as bonuses are something altogether different from the profits of investments or interest on capital. A bonus is the excess of premium beyond the amount necessary to make the principal sum which is repayable to the policy holder. It is a term of the contract between such policy holder and the company, that part of the sum paid should be returned to the former if not required for the risks and liabilities of the company or to make up what is due for the profits of the shareholders. It is admitted that the destination of profits when once ascertained is not material; the respondents' contention is that sums paid to policy holders in the shape of bonuses are not profits at all, but expenses necessarily incurred to procure the general profit which becomes divisible among the shareholders.

The Attorney-General replied.

Cur. adv. vult.

The following judgments were delivered on March 14:—

DAY, J.—This is an appeal from a decision of the Income Tax Commissioners for the City of London, and four questions are more or less specifically submitted upon the Special Case for the determination of this Court.

The respondent company is a proprietary company which carries on the business of marine, fire, and life insurance. In the life department they issue policies of a non-participating and also policies of a participating character. The former are issued at premiums which are calculated, when duly invested at compound interest, to cover all risk and, after payment of proportionate expense of management, to yield a profit to the company. The latter are issued at higher premiums, which are similarly calculated not only to cover all risk and expense, but also to yield a considerable surplus over and above shareholders' or company's profit, out of which benefit and relief may be expected for the participating policy holders according to their fulfilment of their life expectation; and, accordingly, of this surplus two-thirds are by the terms of the policies to be apportioned among these policy holders, while the remaining one-third is to be divided among the shareholders of the company, or be otherwise applicable for the benefit of the company. This surplus is determined quinquennially by ascertaining actual results and calculating contingencies, and the two-thirds which are distributable among the participating policy holders make up a fund which is distributed, either in cash payments, or by way of reduction of premiums, or by addition to the amounts insured. It is conceded that income tax is as a matter of course payable upon the remaining one-third.

The first question submitted to us is whether the fund so appropriated for distribution by way of bonus among the policy holders is or is not liable to be assessed to the income tax—or, to put it in another form, whether it constitutes gains or profits within the Acts regulating the income tax. Now profits (and for the purposes of this case I shall consider that term alone) may be taken here to mean the surplus of income after defraying all, at least necessary, expenses of making it; and if the setting aside this fund for bonus distribution was a necessary expense of making the income, it would certainly not seem to be profit in the above sense—it

would be that which, according to the definition, is to be deducted before the profit can be got at. But this fund is precisely that which the participating policy holders stipulated by their contract should be set aside for them as a charge in their favour and should be expended upon them; it constitutes the sole consideration for their paying the increased premiums. Without such covenant this fund, which is built up out of these increased premiums, would not have come into existence. The setting aside of this fund—the fund itself—is then an expense necessary to the formation of the whole bonus or participating policy profit fund. But clearly it is not profit—not true or net profit—but it is, instead of true or net profit, an expense which has to be deducted from gross profit before true profit can be got at. It seems to me quite unimportant that the policy contract provides for apportionment of profits; that term is there used in a very general sense, and it is clear that the mere word "profit" does not solve any difficulty. Take a simple and not unfrequent illustration. A company appoint a manager at a nominal salary of, say, 100*l.* per annum, and, to stimulate to effort and economy combined, they give him besides, say, one per cent. upon profits. From the latter source he derives, say, 1,100*l.* per annum. His whole income—1,200*l.*—is a charge and expense, and diminishes the true profits of the company, and the company could not be made responsible for the income tax upon the 1,100*l.* any more than for that upon the 100*l.* per annum, both being alike expenses of getting the gross income. It seems to me clear that the company make their own profits, that which constitutes their one-third—certainly as to any excess of profit they may get out of participating as distinguished from non-participating policies—by agreeing to distribute and pay and by paying away to holders of the former the bonus fund by way of inducement to insure; they do it to get the business, to get the income; and it seems to me to be an expense necessarily incurred by the company to procure the fund, namely, the one-third of general profit which it divides among its shareholders or otherwise appropriates to itself.

Were it material I should be disposed to hold that bonus is not profit even in the hands of a policy holder; no doubt it is in a sense an advantage, although certainly not profit, just as a legacy may be an advantage but is certainly not profit. Bonuses are indeed rather inconsistent with the true idea of profit. Speedy death is profitable in life assurance: the longer a man lives the more bonuses no doubt (*cæteris paribus*) will he get, but at the same time the more premiums will he pay, the more interest will he lose, the longer will his estate be kept out of the expected capital—and therefore a bonus can only be regarded as at best a reduction or mitigation of loss, and certainly not as profit even to the policy holder. I may further observe that the fact mentioned by counsel in argument that income tax is not levied upon the funds of mutual societies which are available for bonus seems consistent with the view which I take of the liability of those funds of proprietary companies which are applied to bonus upon the mutual principle.

Here I may pause to observe that no one can doubt, irrespective of the authority of the case which has been cited (*The Mersey Docks* v. *Lucas* (1)), that the destination of profits is utterly irrelevant upon this subject. If profit—true profit—is once existent, it matters not whether it is thrown away or well invested — spent freely or under compulsion, whether of contract or of statute.

I am of opinion, for the reasons above given, that the judgment of the Court upon this first question should affirm the decision of the commissioners and should be against the Crown.

The second question presented to us is as to the right of the company to deduct the whole expenses, if there is no liability to pay duty upon the bonus fund. I say that this should be answered in the affirmative, because the expenses are all necessary to realise the net profit which remains for the company and upon which they pay the duty.

The third question is as to the right of the Crown to levy the duty upon what has been termed the life fund. This should, in my opinion, be answered in the negative. The case of *The Imperial Fire Asso-*

ciation v. *Wilson* (2), to which our attention has been directed, has, in my opinion, no bearing upon the subject. In the course of the argument I have pointed out the radical distinction and difference between fire and life assurance, and I will not repeat myself further than to observe generally that, as fire insurances run out in all their incidents in one year, each payment of premium representing a thoroughly fresh transaction, it practically matters not to either side for income tax purposes whether the profit, which is in such case simply the excess of annual premiums received over annual losses actually sustained, is ascertained with minute accuracy by reference to the current year of each policy, or whether one takes the arbitrary year of the calendar and assumes that to be the true policy year in respect of all receipts and payments within it. The average must be substantially the same in either. In life insurance each year's premium has relation to the whole duration of the life or risk, and every year's premium has to be set aside and capitalised for payment of the future debt. In no sense whatever can the life fund as such be deemed to represent "profit."

The fourth and last question submitted to us is, whether the business of the company is to be dealt with as a whole, or whether it is to be dealt with as three separate businesses—marine, fire, and life insurance. This bears upon the right to take credit generally for the income tax actually paid upon the interest on investments which mainly belong to the life insurance fund. It seems to me that, although the funds and accounts are naturally as well as under compulsion of law kept separate, the business is substantially one business, carried on by one corporate person, and that the decision of the commissioners was hereon also correct.

I am therefore of opinion that the Crown has failed upon all points, and that the judgment of the Court should be in favour of the respondents.

SMITH, J.—I agree in the judgment of my brother Day, except in so far as it applies to what may be called the bonus policy holders. I have nothing to add upon the three points upon which I agree. As regards the bonus policy-holders, it is alleged on the one side that the bonuses paid to them are not assessable to income tax, whereas the Crown avers that they are.

The real question is, whether in this case the amounts paid by way of bonus are or are not gains and profits of the corporation within the meaning of the Income Tax Act.

It is necessary to consider what is the real position of a bonus policy holder, and it may also, as it seems to me, be well to see how and in what way he differs from a shareholder of the corporation. In the case of a shareholder the position is this: the corporation contract, in consideration of money paid by him to the corporation, that they will, out of the gains and profits of their trading, pay to the shareholder, from time to time, a proportion of such gains and profits by way of dividend. In the case of a bonus policy holder, the position, as it seems to me, is this: the corporation contract, in consideration of money paid by him to the corporation by way of premium, that they will pay upon his death the amount stipulated to be paid by the policy; and also that they will, out of the gains and profits of their trading, pay to him, from time to time, a proportion of such gains and profits by way of bonus. That is, as it appears to me, the relative position of a shareholder and a bonus policy holder in the corporation.

It is conceded that the amount distributable to the shareholder is chargeable with income tax. Why? Because it is a part of the gains and profits made by the corporation. I cannot myself see why the residue, as I hold it to be, of the same fund which is distributed to a policy holder by way of bonus should not equally be chargeable to the income tax, and I hold that it is. The gains and profits of the corporation out of which each is to be paid are ascertained, it seems to me, in the same way. On the one side are placed interest upon capital (and in this is included interest upon all investments, bad or good, whatever they may be, which are made by the corporation), premiums received, and any other amount paid into the coffers of the corporation. On the other side are placed payments made on policies,

expenses of management, and so on. The credit balance, if any, in my judgment, is the gain and profit made by the corporation. Out of this fund—that is, the gains and profits — both the shareholder and bonus policy holder are respectively paid his dividend and bonus.

I do not accede to the position that the bonus is merely a return of the premium to the policy holder which is ascertained to be in excess of what the corporation should have taken from the policy holder. In my opinion it is not so. As before stated, the bonus policy holder pays his premium, as I hold, to the corporation, in consideration or upon condition that the corporation will pay the amount out of the policy at his death, and in the mean time allow him to participate in the gains and profits, whatever they may be, of the corporation which may happen to accrue from their trading. It entirely depends upon what those gains and profits are as to what bonus, if any, he receives.

It is suggested that the bonus payable to policy holders should be deducted before the gains and profits of the corporation are ascertained, and this is said, as I understand, to be so because each premium when paid by the policy holder to the corporation is clogged with the condition that if there be any excess in the premium charged such excess shall be paid back. As above stated, I hold that this is not the real position of a bonus policy holder to the corporation. All that the policy holder is entitled to is a proportion of the balance after giving credit for all moneys received and debiting against that sum the disbursements of the corporation.

The above is my opinion. It is with diffidence that I state it, being, as I unfortunately find myself, at variance with my brother Day; but holding it as I do, I am bound to deliver it. If I am right, and if gains and profits are to be ascertained as above mentioned, then it seems to me the case cited by the Attorney-General of *The Mersey Docks* v. *Lucas* (1) is an authority in the Crown's favour, for, when once gains and profits are attained, that case decides that it is immaterial what the ultimate destination of the same may be. For the reasons above given, I am of opinion the Crown's contention as to this is correct, and that the bonus paid to policy holders is assessable to income tax.

Judgment for respondents (3).

Solicitors — Solicitors of Inland Revenue, for appellant; Collyer-Bristow & Co., for respondents.

1884. March 11. } TATTERSALL *v.* THE NATIONAL STEAMSHIP COMPANY (LIMITED).

Ship and Shipping—Bill of Lading—Liability of Shipowner—Damage to Cattle—Ship not reasonably fit for Carriage.

The plaintiff shipped on board the defendants' steamer some cattle to be carried from London to New York, upon the terms of a bill of lading, by which it was agreed "that the defendants, their agents or servants, should, as respects the cattle in question, be in no way responsible for either their escape from the steamer, or for accidents, disease and mortality, and that under no circumstances should they be held liable for more than 5l. for each of the animals." It appeared that the defendants' ship had had on board, on the voyage immediately preceding that by which the plaintiffs' cattle were carried, certain cattle affected with foot and mouth disease, which the plaintiffs' cattle caught owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the ship before the cattle were received on board and the bill of lading signed. The plaintiff in consequence sustained damage amounting to more than 5l. for each of the said cattle:—Held, *that the stipulation in the bill of lading related to the carriage of the cattle upon the voyage, and in no way affected the primary obligation of the shipowner to provide a ship reasonably fit for their reception on board.*

This was a Special Case, of which the following was the material portion :—

(3) Smith, J., withdrew his judgment on the point on which he differed from Day, J.

Tattersall v. *National Steamship Co.*

On the 6th of January, 1881, the plaintiff shipped on board the defendants' steamer ten head of cattle, to be carried from London to New York, upon the terms of a bill of lading.

During the voyage some of the cattle were affected with foot and mouth disease, and were so affected on being landed at New York. On her voyage from New York to London immediately preceding the voyage in question, the ship had on board cattle affected with the foot and mouth disease, and the plaintiff's cattle caught the foot and mouth disease while on board the ship, owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the steamer before receiving the cattle on board and signing the bill of lading. By reason of the plaintiff's cattle having caught the foot and mouth disease, the plaintiff sustained damage amounting to more than 5*l.* for each of the cattle. The bill of lading contained the following clause: — "These animals being in sole charge of shippers' servants, it is hereby expressly agreed that the National Steamship Company (Limited), or its agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer, or for accidents, diseases or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals; all dogs to be placed wherever the captain may appoint, but at the sole risk of the shipper $\frac{\text{and}}{\text{or}}$ owner; the act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers or people; loss or damage resulting from heat, boilers, steam, or steam machinery, including consequences of defect therein or damage thereto, collision, stranding, straining, or other perils of the sea, rivers, steam and steam navigation, and all damage, loss or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from the negligence, default or error of judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner."

The question for the opinion of the Court was whether or not, under the circumstances above mentioned, the defendants were liable for more than 5*l.* for each of the said cattle the defendants' ship had on the voyage.

Petheram, Q.C. (*J. C. Earle* with him), for the plaintiff.—The exceptions in the bill of lading relate only to perils attending the carriage of the goods upon the voyage, against which a shipper can protect himself by a policy of insurance. The present action is for damage resulting from want of care by the defendants' servants in not properly cleansing and disinfecting their steamer before the plaintiff's cattle were received and the bill of lading signed. *Steele* v. *The State Line Steamship Company* (1) is an express authority to shew that a shipowner who accepts goods which he is to deliver impliedly contracts that the ship should start on her voyage in a reasonably fit condition.

Fox, for the defendants. — It is contended upon the construction of this bill of lading that the defendants are entitled to judgment. The clause in the bill of lading which limits the defendants' liability is in very general terms: "under no circumstances" are they to be liable to more than 5*l.* for each animal. The language employed clearly shews that the intention of the parties was to limit the defendants' liability, not only for damage done by a peril in the course of the voyage, but also for negligence in omitting to provide a ship in proper condition to receive the cattle. The words "stevedores or other persons in the service of the shipowner" shew that the negligence of landsmen prior to the commencement of the voyage was contemplated. A shipowner is as much entitled to make a contract of this kind as a railway company was prior to the Railway and Canal Traffic Act, 1854. He cited *Harrison* v. *The London, Brighton and South Coast Railway Company* (2), *McManus* v. *The Lancashire and Yorkshire Railway Company* (3), *Lewis* v. *The Great Western Railway Company* (4), *The*

(1) Law Rep. 3 App. Cas. 72 (Scotch).
(2) 2 B. & S. 122; 31 Law J. Rep. Q.B. 113.
(3) 4 Hurl. & N. 327; 28 Law J. Rep. Exch. 353.
(4) 47 Law J. Rep. Q.B. 131; Law Rep. 3 Q.B. D. 195.

Warkworth (5), and *The Manchester, Sheffield and Lincolnshire Railway Company* v. *Brown* (6).

DAY, J.—It has been clearly established by the judgment of Lord Blackburn in *Steele* v. *The State Line Steamship Company* (1) that where there is a contract to carry goods in a ship, there is, in the absence of any stipulation to the contrary, an implied contract on the part of the shipowner to furnish a ship reasonably fit for the purpose of the voyage. Here the ship was not reasonably fit for its purpose; there was therefore a breach on the part of the defendants of their implied duty; and inasmuch as damage resulted to the plaintiff in consequence of such breach of duty, he is entitled to recover the amount of such damage, unless the defendants are protected by an express stipulation in the bill of lading. Now it has been contended that the plaintiff cannot recover at any rate beyond 5*l.* in respect of each of the animals, by reason of there being a stipulation to that effect in the bill of lading. But on looking through the bill of lading I fail to see any clause restricting the liability of the defendants by reason of the defendants' omission to provide a ship reasonably fit to carry these animals. The stipulation in the bill of lading which has been relied upon by the defendants provides, in my judgment, for the safe carriage of goods, and does not extend to and include a breach of duty for failing to provide a ship fit to carry the goods. If the goods had been damaged by a peril arising in the course of the voyage to a ship reasonably fit to carry such goods, the defendants' liability would, in my judgment, be limited to the sum of 5*l.* But these goods cannot be said to have been damaged by any peril which occurred during the voyage: the damage to them was, as it seems to me, occasioned by the shipowner having thought proper to receive the cattle into a place which was not fitted for their reception. I am clearly of opinion, therefore, that, under the circumstances set forth in the Special Case, the defendants' liability is not limited to 5*l.*, and that judgment should therefore be in favour of the plaintiff.

SMITH, J.—I agree. The real question is, what is the meaning of a very special bill of lading referring to the carriage of certain cattle, and whether the plaintiff is entitled to recover more than 5*l.* per head for the damage which he has sustained. Now the damage was admittedly occasioned owing to the negligence of the defendants' servants in not properly cleansing and disinfecting their steamer before the cattle were received on board; and *Steele's Case* (1) is a direct authority to shew that there is a duty on the part of the shipowner to provide a ship reasonably fit for the carriage of the goods, unless, of course, there is anything in the bill of lading which exempts them from liability. Now does the bill of lading exempt the defendants? I think not. The clause which has been relied upon by the defendants deals, in my judgment, with the carriage of the goods upon the voyage, and does not relate to anything done prior to the commencement of the voyage. It has been argued that the mention of the word "stevedores," who are not sailors, in the bill of lading shews that the acts of the defendants' servants prior to the voyage were contemplated by the bill of lading. But I think the reason why stevedores are mentioned in the bill of lading is because the mode of stowage often affects the damage which arises from sea perils during the voyage. The meaning of the bill of lading seems to me to be this: The shipowner says that as the cattle are to be in the sole charge of the shipper's servants during the voyage, he, the shipowner, is not to be responsible for accidents, disease or mortality, except accidents, disease or mortality brought about by the negligence of the defendants' servants. Then it is further stipulated that "under no circumstances" shall they be held liable for more than 5*l.* for each of the animals—that is to say, the defendants are not to be liable beyond 5*l.* even for accidents, disease or mortality arising during the voyage and occasioned by their own negligence. But this stipulation in no way affects the primary obligation on the part of a shipowner to have a ship reasonably fit for the carriage of

(5) 53 Law J. Rep. P., D. & A. 4; Law Rep. 9 P.D. 20.

(6) 52 Law J. Rep. Q.B. 132; Law Rep. 8 App. Cas. 703.

goods. On these grounds I have come to the conclusion that our judgment must be for the plaintiff.

Judgment for plaintiff.

Solicitors—Baileys, Shaw & Gillett, for plaintiff; Parker, Garrett & Parker, for defendants.

1884. April 30. } CASSON *v.* CHURCHLEY. (E. CHURCHLEY, *claimant.*)

Bills of Sale Acts, 1878, 1882 (41 & 42 *Vict. c.* 31; 45 & 46 *Vict. c.* 43)—*Absolute Bill of Sale—Attestation.*

The Bills of Sale Act, 1882, *repeals section* 10 *of the Bills of Sale Act*, 1878, *only so far as that section relates to bills of sale given by way of security for the payment of money, and consequently bills of sale granted by way of absolute transfer must still be attested in manner provided by section* 10 *of the Act of* 1878.

Swift *v.* Pannell (53 Law J. Rep. Chanc. 341; Law Rep. 24 Ch. D. 210) *followed.*

Interpleader issue to determine the validity of a bill of sale.

The plaintiff recovered judgment against the defendant in the Lord Mayor's Court, and issued execution, under which the sheriff seized certain furniture, &c., in the house of the defendant at Ramsgate. These goods were thereupon claimed by Eliza Churchley, the wife of the defendant, under a deed dated the 26th of February, 1884, and made between the defendant and Eliza Churchley, whereby the defendant for good consideration conveyed and assigned the above mentioned goods to her, to have and to hold as her own absolute property and separate estate. The deed was executed and attested and was duly registered as an absolute bill of sale on the 1st of March, 1884. The attestation clause was in the form given in the schedule to the Bills of Sale Act, 1882, and was as follows:—

"Signed, sealed and delivered by the within-named George William Churchley and Eliza Churchley, in the presence of

"W. J. Godden,

"of 12 New Inn, Strand,

"solicitor."

The sheriff having interpleaded, the plaintiff and the claimant came before Field, J., at chambers, under Order LVII. rule 8, when, after hearing the parties in support of their respective claims to the goods, the learned Judge referred all matters arising out of the interpleader summons to the Divisional Court.

Upjohn, for the plaintiff, the execution creditor.—The bill of sale is void, because it is not stated in the attestation that before execution the effect of the bill of sale was explained to the grantor by the attesting solicitor, in accordance with section 10 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). The repeal of this section by section 10 of the Act of 1882 is limited to bills of sale given by way of security for the payment of money; to all other bills of sale the Act of 1882 (45 & 46 Vict. c. 43) has no application; and the present bill of sale is consequently governed by the Act of 1878, and, not being attested in accordance with the directions of that statute, is void. In *Swift* v. *Pannell* (1), Fry, J., discussed the effect of the two Bills of Sale Acts, and decided that bills of sale by way of absolute transfer were regulated by the Act of 1878, and bills by way of security by the Act of 1882. In *Reeves* v. *Barlow* (2) Denman, J., and Hawkins, J., suggested that section 8 of the Bills of Sale Act, 1878, requiring the registration of bills of sale within that Act, was repealed by section 15 of the Bills of Sale Act, 1882, and directed the case to be re-argued. Pending the re-argument, the case of *Swift* v. *Pannell* (1) was decided, and the Court (Williams, J., and Smith, J.) before whom the case came the second time were of opinion that since the decision of *Swift* v. *Pannell* (1) the point was untenable (3).

Adkins, for the claimant.—The bill of sale is governed by the Act of 1882, and the attestation is therefore sufficient. Section 10 of that Act absolutely repeals section 10 of the Act of 1878. In *Swift*

(1) 53 Law J. Rep. Chanc. 341; Law Rep. 24 Ch. D. 210.

(2) Law Rep. 11 Q.B. D. 610; on appeal, *ante*, p. 192; Law Rep. 12 Q.B. D. 436.

(3) See these cases discussed in Law Journal Weekly Notes, 1884, p. 235.

v. *Pannell* (1) Fry, J., was of opinion that section 15 of the Act of 1882 was a qualified repeal of the previous Act, but section 10 is absolute in its terms. The result of the plaintiffs' contention would be that an absolute transfer, which is simple and requires no explanation, has to be explained to the grantor by a solicitor, whereas a bill of sale by way of mortgage, which may be complicated and difficult to understand, need not be so explained. The grantors of conditional bills of sale, which are those usually required by money-lenders, require the protection of the Act of 1878 much more than persons who transfer their property absolutely by bills of sale. It cannot be intended that the expressions "every bill of sale" and "a bill of sale" in sections 4–13 of the Act of 1882 are to be confined to conditional bills of sale, for half the operation of those sections would be struck out by such a construction. Assuming that the bill of sale is governed by the Act of 1878, the signature of the witness is all that is required for purposes of attestation. Section 8 of the Act of 1878 says that the bill of sale shall be "duly attested," and section 10 does not require that any explanation by the attesting solicitor should in fact have been given—*Ex parte The National Mercantile Bank* (4).

Upjohn, in reply.

GROVE, J.—This case is not free from difficulty, because of the complication involved in construing the Bills of Sale Acts, 1878 and 1882; but the best construction I can place upon those Acts is that which has already been given by Mr. Justice Fry in *Swift* v. *Pannell* (1). The Act of 1882 would have been expressed more clearly, if it had been stated that this Act is only to apply to bills of sale given by way of security for the payment of money, instead of the involved phraseology of section 3, which contains in its last paragraph the interpretation clause of the Act. Section 10 requires the attestation simply to be made by one or two witnesses, and dispenses with the further requirements of the Act of 1878. Those requirements have not been complied with in the present case, and it is contended that the bill of sale is consequently void, because it is not a bill of sale given by way of security for money, and therefore not within the provisions of the Act of 1882. I am of opinion that this contention is right. With the scope and object of the Act of 1882, whether it is intended to apply to bills of sale which are generally given to money-lenders and often give rise to frauds, we have nothing to do; we can only give the construction which appears to be right irrespective of such considerations. The same construction is placed on the Acts of 1878 and 1882 by Mr. Justice Fry in *Swift* v. *Pannell* (1). In commenting upon section 15 of the Act of 1882, he says, "It is plain that no enactment in the principal Act which relates to absolute bills of sale can be inconsistent with this Act, because this Act relates only to bills of sale by way of security, but no doubt the words are, 'the eighth and twentieth sections of the principal Act shall be repealed.' That would be a plain repeal but for the words of the 3rd section, which appear to me to confine the whole operation of the Act to bills of sale by way of security." Mr. Justice Fry therefore goes the length of holding that the bills of sale which are not inconsistent with the Act of 1882, and which are therefore unaffected by that Act, are bills of sale by way of absolute transfer.

In accordance with the rule that where there is power to appeal the Courts are bound by the decisions of Courts of co-ordinate jurisdiction, we are bound by the judgment of Mr. Justice Fry; and as far as my opinion goes it coincides with his. The argument which affected my mind the most strongly against this view was that which questioned the propriety of limiting the expressions "every bill of sale," "a bill of sale," used in so many sections of the Act of 1882, to conditional bills of sale; but it seems to me that the interpretation clause in section 3 concludes that argument: to allow it to prevail would repeal the second paragraph of section 3. Further, the form given in the schedule is one of a conditional bill of sale. It may be desirable, as was urged by the counsel for the claimant, that absolute

(4) 49 Law J. Rep. Bankr. 62; Law Rep. Ch. D. 42.

bills of sale should be unfettered by formalities, and there is no clear reason why the Act of 1882 should be limited to conditional bills of sale. But although the verbiage of section 3 is singular, yet when we unravel the sentences, there is no ambiguity in its meaning, which is that the Act of 1882 is limited to conditional bills of sale, and this bill of sale is therefore insufficiently attested.

It was then argued that, so long as the bill of sale is "duly attested," it is valid, even if not explained by the attesting solicitor as required by section 10 of the Act of 1878; but the words "duly attested" clearly mean attested in the manner provided by section 10.

Lastly, it was argued that as this deed was an absolute conveyance from the husband to the wife, the instrument did not require the formalities of a bill of sale. But no authority has been cited in support of this contention, and the case of *Ashton* v. *Blackshaw* (5) is opposed to it. In my judgment, therefore, this bill of sale is void, and the claimant must be barred.

HUDDLESTON, B.—I am of the same opinion, and, although the matter is not clear, I think I can discern the meaning of the Legislature as expressed by the Act of 1882. Mr. Justice Fry has considered the construction of the two Bills of Sale Acts, and has come to the conclusion that the Act of 1878 applies to absolute bills of sale, and the Act of 1882 to conditional bills of sale—that is, bills of sale conditional on the reconveyance of the subject-matter when the advance is repaid. I should mention that *Swift* v. *Pannell* (1) is incorrectly reported in the *Law Reports*: the defendant is represented to be the grantee, whereas it was the plaintiff who was grantee; the arguments which are attributed to the plaintiff should be attributed to the defendant, and the arguments which are attributed to the defendant should be attributed to the plaintiff. The case is correctly reported in the *Law Journal Reports*, although in that report the 35th section is referred to instead of the 3rd section. In that case Mr. Justice Fry clearly decides the present point where he says, "I am holding that to absolute bills of sale the Act does not apply." There is therefore clear authority on the proposition by a Court of co-ordinate jurisdiction. It is an authority with which I entirely agree; and, without repeating the reasons advanced by Mr. Justice Grove, I will add some further reasons by which I have come to the same conclusion.

At the conclusion of section 3 of the Act of 1882 are the words "to which last-mentioned bills of sale"—that is, bills of sale other than bills of sale for the security of money—"this Act shall not apply." This is a positive enactment to the effect that this Act is not to apply to absolute bills of sale. If I am right this disposes of the case, and a very cursory reference to the other sections of the Act will suffice. Section 7 has clearly no application to absolute bills of sale. Sections 8 and 10 refer to attestation, enacting that it shall not be the same as in the Act of 1878, and section 9 gives the form, which when referred to in the schedule is found to be a conditional and not an absolute bill of sale, and thereby carrying out the intention expressed by the Legislature in section 3. Section 12 supports what is supposed to be the object of the Act. It was said that poor people were frequently ruined by bills of sale given for the purposes of money loans, and by that section no such bill of sale may be granted for less than 30*l.*; but there is no reason why an absolute bill of sale should not be granted for a less sum.

I come therefore to the conclusion that the Act of 1882 only applies to bills of sale given for the security of money, and not to absolute bills of sale. The Act, then, of 1878 applies to absolute bills of sale; that Act requires that the attesting solicitor shall state in his attestation that he has explained the effect of the bill of sale to the grantor. This has not been done in the present case, and therefore the bill of sale is void.

But it is said that, notwithstanding the Act of 1878, the attestation is sufficient, because the direction to explain is merely directory, and the bill of sale would be good although the explanation had not in fact been made; but such a contention, if valid, would set the provisions of the Act

(5) 39 Law J. Rep. Chanc. 705; Law Rep. 9 Eq. 510.

at nought. *Davis* v. *Goodman* (6) and *Ford* v. *Kettle* (7) shew that sections 8 and 10 of the Act of 1878 must be read together, and the Legislature has prescribed by section 10 the attestation which is required by section 8.

The last contention was that since the property was vested in the grantee by gift no document was necessary, and if one was drawn up it need not be registered. It is true that the property might be transferred by gift, but this point was considered by Vice-Chancellor Malins in *Ashton* v. *Blackshaw* (5), where a husband assigned his furniture to his wife by a deed which was not registered as a bill of sale, and the Vice-Chancellor held that, although the wife would have been entitled to have the furniture secured for her separate use, yet, as the assignment was not registered as a bill of sale, the furniture, on his bankruptcy, could not be protected against the assignee. This bill of sale is, in my judgment, within the operation of the Act of 1878, and should be attested in accordance with that Act. The claim of the claimant therefore fails, and must be barred.

Claimant barred.

Solicitors—Thomson & Ward, for plaintiff; E. M. Armstrong, for claimant.

1883. Dec. 14. COLAM (*appellant*) *v.* PAGET (*respondent*).

Cruelty to Animals—12 & 13 *Vict. c.* 92. *ss.* 2 *and* 29, *and* 17 & 18 *Vict. c.* 60. *s.* 3—"*Domestic Animal*"—*Decoy Bird.*

[For the report of the above case, see 53 Law J. Rep. M.C. 64.]

(6) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

(7) 51 Law J. Rep. Q.B. 558; Law Rep. 9 Q.B. D. 139.

[IN THE COURT OF APPEAL.]

1884. May 9, 10, 12. DUCK *v.* BATES.*

Copyright—Piracy—Dramatic Piece—Right to Sole Liberty of Representing—Infringement of—Performance not for Profit at a Hospital—Place of Dramatic Entertainment—3 & 4 *Will.* 4. *c.* 15. *ss.* 1 *and* 2.

The plaintiff, the assignee of the sole liberty of representing a dramatic piece, sought, under 3 & 4 *Will.* 4. *c.* 15, *to recover damages or penalties from the defendant, who, as one of an amateur club, had with others given three representations of the piece at a hospital before the nurses, medical officers and attendants of the hospital. Friends of the actors were admitted to one of the representations, tickets in blank being issued free of charge, some of which were sent to editors of theatrical newspapers, one of whom sent a reporter to attend one of the representations*:—Held, *affirming the judgment of the Queen's Bench Division, by* BRETT, M.R., *and* BOWEN, L.J., *dissentiente* FRY, L.J., *that the defendant had not infringed the provisions of the statute* 3 & 4 *Will.* 4. *c.* 15, *for that the performance was a domestic and not a public performance.*

Appeal by the plaintiff from the judgment of the Queen's Bench Division.

The case is reported *ante*, p. 97.

The plaintiff was the assignee of the right of the sole liberty of representing a dramatic piece called "Our Boys," and the defendant was a member of an amateur dramatic club, which gave three representations of that piece in the board room at Guy's Hospital. The admission to the performance was free, a general invitation being given to the nurses, attendants and others connected with the hospital, through the sisters who superintended the arrangements of the hospital. Tickets were also issued to the physicians, surgeons, and to some of the students; and on the third representation some transferable tickets were issued in blank to the friends and families of the actors. On each occasion there were about 170 persons present.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

One of the actors sent some tickets to the editors of certain theatrical papers, and on the last occasion one reporter was present.

The Judge of the Southwark County Court, in which the plaintiff brought an action to recover damages or penalties under 3 & 4 Will. 4. c. 15, ss. 1 and 2, nonsuited the plaintiff.

The plaintiff obtained a rule in the Queen's Bench Division to enter judgment for him, or for a new trial, which was afterwards discharged.

Leave was given to appeal.

The plaintiff appealed.

Charles, *Q.C.*, and *Leonard*, for the appellant.—The object of 3 & 4 Will. 4. c. 15. ss. 1 and 2 (1), is to give to the author of a dramatic piece, or to his assignee, the sole liberty of representing or causing it to be represented at any place of dramatic entertainment whatsoever. That Act, therefore, provides for the protection of that property, and it has been held that a place becomes a place of dramatic entertainment if a dramatic piece is played there. Whether the performance of a piece therein constitutes an offence under the statute is another question.

The Act 3 & 4 Will. 4. c. 15 gives the owner of this property the right of representing the play at any place of dramatic entertainment whatsoever. There is no limitation, and a place may be a place of dramatic entertainment even though it is not a place usually or habitually used for such entertainments—*Russell* v. *Smith* (2).

[FRY, L.J.—Must there not be some limitation: must there not be an entertainment; would a mere rehearsal be an infringement of the right?]

It must be a question of fact in each case.

[BRETT, M.R.—Must there not be an element of publicity?]

That would seem to be so; but there was publicity in this case, friends and reporters were invited, and transferable tickets were issued. It is not necessary that the representation should be for profit, the test to be applied is the probability of injury to the owner of the property. The object of the Legislature was to secure to the owner of the right the value of his property, and so to give encouragement to authors—*Wall* v. *Taylor* (3), *Planché* v. *Braham* (4) and *Murray* v. *Elliston* (5).

[BOWEN, L.J.—What the word "entertainment" means was considered in *Muir* v. *Keay* (6) and in *Howes* v. *The Board of Inland Revenue* (7).]

Lumley Smith, *Q.C.*, and *Smythies*, for the defendant.—The object of the statute 3 & 4 Will. 4. c. 15 (1) was to protect the owner of the right of representing a play from the infringement of that right by persons who intend to make money out of

(1) 3 & 4 Will. 4. c. 15. s. 1, enacts "That from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed and published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever . . . . any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof, and that the author of any such production . . . . or the assignee of such author shall . . . . have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof."

Section 2: "If any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment . . . . any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author. . . ."

(2) 12 Q.B. Rep. 217; 17 Law J. Rep. Q.B. 225.

(3) 52 Law J. Rep. Q.B. 558; Law Rep. 11 Q.B. D. 102.

(4) 4 Bing. N.C. 17.

(5) 5 B. & Ald. 657.

(6) 44 Law J. Rep. M.C. 143; Law Rep. 10 Q.B. 594.

(7) 46 Law J. Rep. M.C. 15; Law Rep. 1 Ex. D. 385.

the performance. No place can be called a "place of dramatic entertainment" except a place ordinarily and habitually used for the representation in public of plays for profit or gain. The phrase "dramatic entertainment" implies publicity; the remedies given in section 2 (1) shew that the cases present to the mind of the Legislature were those cases in which profit is made.

In *Russell* v. *Smith* (2) Crosby Hall was held to be a place of dramatic entertainment, because it was used for the public performance of dramatic pieces for profit.

[BOWEN, L.J.—I am aware that it is said in my judgment in *Wall* v. *Taylor* (3) that representing a piece at a place of public entertainment is the essence of the offence. I ought to have said at a place of dramatic entertainment (8).]

In the present case there was nothing more than a private performance in the hospital; there was no publicity, no profit, no damage, and the place was not a place habitually used for dramatic entertainments.

[FRY, L.J.—Were not the tickets transferable?]

No one was present save certain selected persons.

[BRETT, M.R.—We are agreed that it is not necessary that the place used should be a place ordinarily used for dramatic entertainments, nor need the performance be for profit in order to constitute an infringement; but the question is whether there was here that amount of publicity which will render the defendant liable.]

Wall v. *Taylor* (3) and 45 & 46 Vict. c. 40 were referred to.

Charles, Q.C., in reply.

Cur. adv. vult.

BRETT, M.R. (on May 12).—In this case the acting of this play was, without doubt, a dramatic entertainment, and the question which arises is whether the defendant has infringed the provisions of 3 & 4 Will. 4. c. 15 (1) by representing or causing to be represented this dramatic piece at a place of dramatic entertainment. It seems to me that we are not concerned in this case with the provisions of 5 & 6 Vict. c. 45. What occurred here was that the defendant was party to the representation of a dramatic piece or entertainment, in which the plaintiff has a right of property under the statute of Will. 4, and the question is whether there has been such a breach of the provisions of that statute as will entitle the plaintiff to maintain an action under section 2. I apply myself in the first place to the consideration of the phraseology of the statute, having regard to the ordinary meaning of the English language as it is used by people with respect to the subject-matter dealt with in the statute. That subject-matter is in this statute the exclusive right of certain persons to represent or cause to be represented any "tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment." But besides that, I also rest myself upon other assistance which may be collected from other parts of the statute itself, and make use of such assistance in construing the Act under consideration. I am of opinion that the Act of Will. 4 was intended to protect the commercial value attaching to the property in the dramatic inventions contemplated by the Act; the protection given was a protection from a business point of view, so that it was intended to protect that which was of value to the author or his assignee, that is, the property which he had in the right of causing the dramatic piece to be represented for value. If, therefore, we consider what will injure that property, that right, and that business value, it will, I think, help us to construe the statute.

It is obvious that if a rival actor or manager causes a play to be represented in the same way and under the same conditions as that in which the owner of the right of representing that play is representing it, the owner must thereby be injured, so that it might be said that the object of the Legislature was to protect such an owner from the rivalry and injury which would arise from the rivalry of those who might represent that play for profit; but that this is not all, is clear from the fact that the owner might be injured to as great an extent even though

(8) In the Law Journal Report the Lord Justice is reported to have said at any place of "dramatic" entertainment.

the rival did not represent the play for profit. We find, therefore, that the protection given extends beyond the injury which may be caused by a representation given for profit, and we cannot limit the Act to such a case only. I proceed, therefore, to enquire whether the interest of the owner would be sufficiently protected if we were to hold that the right of property given to him by the statute would only be infringed if the piece were acted in a place where such pieces are habitually acted. If we were to hold this it would be tantamount to holding that an infringement could only take place by a representation in a regular licensed theatre, whereas the Legislature has not enacted that. It is obvious that people who acted such a play in a room or a hall would take away the spectators from a place where the owner of the right of representing the play might be having it represented, and that he would thus be injured even though the representation was not given in a place habitually devoted to dramatic entertainments. I should not expect therefore to find this limitation in the statute, and I am of opinion that there may be an infringement of the right of property even though the representation is not given in a place habitually devoted to dramatic entertainments.

If it has been supposed that I have said that the fact of an entertainment being a dramatic entertainment makes the place where it is given a place of dramatic entertainment for all time, I am prepared to say that such a statement is not a correct statement of the law. I do not think that I ever did so express myself, but whether I did or not is immaterial. I turn now to 3 & 4 Will. 4. c. 15. s. 2, in order to consider what the words "any place of dramatic entertainment" mean. It is obvious that there is some place in which a dramatic entertainment may be represented without infringing the statute, as otherwise the words "any place of dramatic entertainment" would not have been inserted in the section. What the statute aims at is not only a representation, but also a representation at a place of dramatic entertainment. Those who drew this statute intended to deal with the rights of the authors of certain compositions, and they used large words to describe the subject-matter of the enactment, and said that "the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment" should have a certain property, and then they proceeded to state that it would be an infringement of this right of property to represent any of the already specified productions at a place of dramatic entertainment.

I incline to think that the framers of this statute had not foreseen the magnitude of the development of the taste for acting; but, as I have said, we must consider what the words used mean when used by people dealing with the subject-matter of this enactment. It is impossible that the Act should intend to include a play acted by children in a nursery, or acted by them before their parents in the drawing-room—those places cannot in such circumstances be called places of dramatic entertainment, so that there must be some place which holds a middle place between a licensed theatre and a place which no one could call a place of dramatic entertainment—a place, that is, which can become a place of dramatic entertainment. It is obvious that the performance in the nursery or the drawing-room which I have suggested is private and domestic, and if to the performance in the drawing-room are admitted friends and servants, still the performance and the place remain private and domestic, and the room is not a place of dramatic entertainment. The statute protects the right of representing a play for value: there is, however, no commercial value in such a performance as that I have described; so that it seems to me that the performance must be, although something not exactly the same as a performance for money, still a representation which, though not given for money, would interfere with the same people as would go to see the play when represented by the owner for money. Can it make any difference if an unfurnished house were taken and the play acted there before the friends and servants already suggested? It is obvious that it could not, and that such a representation would be the same as the representation in the

host's own drawing-room. It seems to me that the place where the play is represented must be a place which must be something other than domestic or internal, that there must be publicity, and that the audience or spectators must form a sufficient part of the public, as public, to make one say that they are part of the people who would go to the place where the owner of the right of representation would give a representation of the play as a matter of business and commerce.

If, for instance, a representation were given in a country town, and the neighbours and the people resident in the county were requested to attend, then, as it seems to me, they would not be invited as friends, but they would come as a limited part of that public which might attend a representation of the play given by the owner of the right of representing the play. If persons act a play which is protected by the statute in a room, and allow any one to come, then though they make no profit themselves, but give the proceeds to a charity, still the right given by the statute is infringed; and such would also be the case if they gave the tickets away free, for in neither of those cases would there be anything domestic or internal.

It seems to me that it must be a question of fact in each case whether the nature of the representation given makes it public or leaves it domestic. A place may be a place of dramatic entertainment for the time, although it is so used only once, and although no payment is taken; but the statute requires an element of publicity, and this, I think, is further shewn by the damages given by the 2nd section of the statute to the owner whose right is infringed. That section says that the offender shall be liable to pay not less than 40*s*.—that applies to a case in which no substantial injury is shewn; or he is made liable to pay the full amount of the benefit or advantage arising from the representation—this provision has reference to a case in which the persons who represent the play do so for payment; or, lastly, he is liable to pay the injury or loss sustained by the owner of the property—and this is the measure of damages in those cases in which the persons who infringe his rights make no profit and act for nothing.

This part of the section shews that the statute is aimed at that kind of representation which takes away from the profit of the owner of the right of representation; and a representation which is purely private, domestic and internal does not have that effect.

To apply, then, these observations to the facts of the present case, I think it must be observed that the real object of the representation was to benefit the attendants of the hospital; to these were added the officers of the hospital and their families; and thus far the whole representation must be considered domestic. Then the actors desired to invite their families; but still the gathering was a domestic and not a public one. It has been urged that the tickets were in blank, and therefore transferable; but I cannot see that it was intended they should be transferred; and the fact which really created a doubt in my mind was the invitation to reporters to attend the representation: that did seem to introduce an element of publicity; but I think that that may be credited to the vanity of an individual actor. So that in this particular case the representation was really a domestic representation, and so not within the purview of the Act, and therefore I think that the judgment must be affirmed.

I would add that if any one were to try and go beyond such facts as exist in this case, and were to introduce the element of publicity in any greater degree, then I think the Act would apply and that the provisions of section 2 would be infringed.

Bowen, L.J.—The question raised on this appeal is difficult, in consequence of the vagueness of the words used in the statute. That some limitation must be put upon those words is clear; but I think the words of the statute must be construed in their plain and natural signification, unless there is something in the context or subject-matter which prevents them from receiving that meaning. When the statute 3 & 4 Will. 4. c. 15 was passed, there was no such thing as property in the right of representing dramatic pieces; that property was created and defined by that statute.

Duck v. *Bates, App.*

Section 1 says that the author or his assignee "shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever" the productions specified in the section. The first thing to notice, as it seems to me, is the large words "any other dramatic piece or entertainment"—general words which sweep in everything *ejusdem generis* with the words which have gone before. These words define that which the owner is to have the sole liberty of representing; and then in section 2 we find these general words limited by the words "at any place of dramatic entertainment"; so that it is not only representing the pieces before described which is forbidden, but it is the representing them at a particular place. What, then, was meant in 1833 by a place of dramatic entertainment? *Prima facie* the Legislature no doubt meant a place assigned generally and habitually as a place of dramatic entertainment—a public or a *quasi* public place of amusement where profit is made, or where such a portion of the public would attend as would interfere with the profit of the owner of the right of representation. The language of the section, however, is wide enough to apply to places other than places of habitual entertainment, for it is obvious that the intention of the Act would be evaded if a person could, by frequently changing the place of the performance, attract the public, and thus receive money by representing a piece the right to represent which is protected by the Act. This could be done by travelling players who perform in booths, by persons who might take halls in country towns, where all the public or the neighbourhood might attend; so that a place thus used would fall within the purview of the Act, even though it was not a place habitually used for dramatic entertainments. I think that the true meaning of this expression, "a place of dramatic entertainment," must be a place appropriated for the nonce for purposes of a dramatic entertainment, something in the same way as places not habitually appropriated as such are appropriated for the amusement of the public or of a limited portion of the public; and if so, it must be a question of fact in each case whether a particular place is for the time converted into a place of dramatic entertainment. No doubt the element of profit would be an important element, and so would the element of numbers. This view is consistent with the view taken in *Russell* v. *Smith* (2), where it was said: "It follows that, as Crosby Hall was for the public representation for profit of a dramatic piece, it became a place of dramatic entertainment for the time within the statutes now in question. The use for the time in question, and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre if used for the representation of a regular stage play. In this sense, as the 'Ship on Fire' was a dramatic piece in our view, Crosby Hall, when used for the public representation and performance of it for profit, became a place of dramatic entertainment."

It appears to me that the facts of this case bring it near to the line, but that they do not cause it to pass that line. I think on the whole that the performance was domestic and not public; it was a performance in a hospital for the delectation of the persons who were conducting the ordinary business of the hospital, but not for the delectation of every subscriber to the hospital, nor for that of the public; the performance was primarily for the nurses and officials and their families, and the fact that the families of the actors attended does not, I think, make it a public performance; nor does the presence of the reporter: he came not as one of the public, but rather as one who was to tell of it to the public. I think, therefore, that the judgment appealed from is right; but I would join in the warning of the Master of the Rolls as to the consequences which must ensue if by any device it is attempted to pass the line on the edge of which this case lies.

FRY, L.J.—I have the misfortune to differ from the Master of the Rolls and Lord Justice Bowen. I agree that the case is a difficult case, and I agree with the Master of the Rolls that we are con-

cerned in this case with 3 & 4 Will. 4. c. 15; that 5 & 6 Vict. c. 45 does not enlarge the right given by the earlier statute, but that it only extends its duration.

The statute of Will. 4 uses words of great generality, and sums up the provision in the words "or any other dramatic piece." Now there is no question here but that this piece was a dramatic piece, and the sole question is whether the board-room at Guy's Hospital was for the time a place of dramatic entertainment. I think it should be remembered that the statute contains no expression relating to the place being a place ordinarily or habitually used for dramatic entertainments; nothing is expressly said as to the place being a public place; nothing is said with respect to the performance being for reward, hire or gain. It is, however, said that we ought to consider what was the condition of such matters in 1833. If we ought, then I think that the Legislature, which knew that great changes have taken place in such matters since the days of Elizabeth, may well be supposed to have contemplated that further changes would take place in future, and that on that account it used large and general words. In the first section there are very important words—the words "any place" and the word "whatsoever"—for these words exclude any limitation or qualification, and declare affirmatively that the genus of the place described is to prevail in its utmost generality. There is, then, no reason why "any place of dramatic entertainment" should mean any place habitually used as a place of dramatic entertainment. It is well known that stage plays were represented in other places; that halls in country towns and that barns were used for that purpose; that strolling players gave representations in various kinds of places, and it is certain that they could not defeat the object of the Act by changing the place of representation each night. Nor are there words in the statute which import that the acting must be for reward or hire; and therefore I agree with the Master of the Rolls and Lord Justice Bowen that it is not essential that there should be any such element in order to bring a representation within this statute; and I agree that the statute contemplated a place at which a dramatic piece is represented. I think that there is no dramatic entertainment unless some one is entertained or amused, so that the studies of the actors and the rehearsals not held before an audience cannot be said to be dramatic entertainments, and consequently the owner of the right of representation cannot interfere with these. A dramatic entertainment involves the notion of a gathering of people for the purpose of listening to and seeing it; so that the casual lookers-on peeping through a door would not make a rehearsal such an entertainment. It seems to me that it involves the idea that the performance is the result of some plan, design, and scheme, the design being the amusement of the audience. But I do not think it involves the idea that it must be given in what is called a public hall, because a dramatic piece performed in a large drawing-room or hall in a private house might be a dramatic entertainment even though the public are not invited, just as a musical party is a musical entertainment even though the public are not invited.

It is suggested that it would be absurd to extend the operation of the statute to an internal domestic representation. That would be true if it were held that children acting plays in a nursery were representing a dramatic entertainment; but there may be internal domestic representations which would be within the Act. For if some one owning a large house were to give a representation of a play to his guests, his household and his neighbours in the county, would that not be in one sense both internal and domestic, and yet would it not most certainly interfere with the attendance at and receipts of any company of actors which might be visiting the neighbouring town about that time?

I have asked myself whether the construction which I am led to adopt gives to the statute a meaning in excess of the natural meaning of the Legislature, and whether it extends the protection given by the Legislature too far; and it seems to me on consideration that it does not. I have also asked myself whether section 2, which gives the owner certain remedies for any infringement of his right, throws any light on that right, and whether it limits it or

not; and the answer seems to me to be that section 2 gives three remedies, one of which—the penalty of 40*s.*—applies to a case in which the owner of the property is damaged and the actor gets no profit, and that that shews that such a case as this comes within the purview of the statute. So that, feeling as I do how much the authority of the Divisional Court and of the other members of this Court outweighs my own opinion, I am unwillingly obliged to differ and to say that this appeal ought to be allowed.

Judgment affirmed.

Solicitors—B. C. Cowan, agent for J. A. Tucker, Bath, for plaintiff; Burgess & Cosens, for defendant.

[IN THE COURT OF APPEAL.]

1884. May 19. } THE WEST LONDON COMMERCIAL BANK *v.* KITSON AND OTHERS.*

Company—Directors, Personal Liability of—Bill of Exchange—False Representation of Authority to accept.

The defendants, two directors and the secretary of an incorporated limited company which had no power to accept bills, at the request of their engineer and in accordance with a resolution that the company should accept his draft on account of professional services, gave to the engineer an acceptance in the following terms:—"Accepted payable at . . . . for and on behalf of the tramway company—G. K., S. F. P. (directors), B. W. (secretary)." When giving the acceptance the directors told the engineer that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills; and the engineer, on pressing them for the acceptance, told them that he could raise money on it from his father-in-law. The engineer indorsed the bill to the plaintiffs for value, and without notice to them of the understanding between him and the defendants. The bill was dishonoured, and the defendants were sued by the holders:—Held, *that the defendants were personally liable, as by accepting the bill and putting it within the power of the drawer to negotiate it, they represented that they had authority to accept, and such representation being false in fact would therefore support an action.*

Judgment of the Queen's Bench Division (*ante*, p. 218) *affirmed.*

Appeal from a judgment of the Queen's Bench Division on a Special Case. The case is reported *ante*, p. 218, where the facts are fully stated.

The defendants Kitson and Porter, who were two directors of a tramway company incorporated under a private Act of Parliament, together with the secretary, had, at the request of their engineer, to whom the company owed money, accepted a bill for 400*l.*, payable three months after date, in the following form:—"Accepted payable at Messrs. Hull, Smith, Woodbridge & Co.'s Bank, Brentford, for and on behalf of the Brentford and Isleworth Tramways Company.

"Geo. Kitson, } Directors.
"S. F. Porter, }
"B. Woodward, Secretary."

The engineer, before the bill was accepted, requested the defendants to accept it in order that he might raise money upon it, and further told them that he would be able to get the money from his father-in-law. The defendants, when giving the acceptance, told the engineer that they did so in recognition of the debt owing to him, and upon the understanding that he did not negotiate the bill.

The bill was taken by the engineer to the plaintiffs, who discounted it, but received no notice of the terms upon which it had been accepted; when it fell due and was presented for payment it was dishonoured. The company had no power under their private Act of Parliament to accept bills.

In an action by the plaintiffs, as holders of the bill, the Queen's Bench Division (Day, J., and Smith, J.) held that the plaintiffs were entitled to recover.

The defendants Kitson and Porter appealed.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

T. Terrell, for the defendants, contended that as the acceptance was on behalf of the company it merely amounted to a representation as a matter of law that the company had power to accept bills, and that such representation gave the plaintiffs no cause of action. *Alexander* v. *Sizer* (1), *Beattie* v. *Lord Ebury* (2), *Bateman* v. *The Mid-Wales Railway Company* (3), *Eaglesfield* v. *The Marquis of Londonderry* (4) and *Rashdall* v. *Ford* (5) were referred to.

Francis Turner, for the plaintiffs, was not called upon.

BRETT, M.R.—It seems to me that this is one of the simplest common-law cases that it is possible to state. Here are certain persons who allow a bill to be drawn upon them, and who accept it, under these circumstances: They are directors of a tramway company formed under a private Act of Parliament which no one but themselves is bound to look at; they know that that Act has not given them power to accept bills; but their engineer, to whom the company owes money, presses them for payment, and, knowing that the company have no cash, he says that he will draw a bill upon them, and that he will ask his father-in-law to give him money upon it. That is not an undertaking that he will not apply to any one else but his father-in-law; it is a mere statement of an expectation that his father-in-law will discount the bill. The directors do not communicate with the father-in-law, nor do they take steps to restrain the negotiation of the bill, beyond telling the engineer when they gave their acceptance that they did so upon the understanding that he should not negotiate it, and merely as a recognition of the company's debt to him, as the company had no power to accept bills. The Special Case does not state that the acceptance was given upon the terms that the engineer should not negotiate it; the defendants do not venture to state that the bill was accepted upon those terms: it was obtained by the engineer in order that he might negotiate it, and the defendants knew that he took it for that purpose. That is the inference I draw from the facts stated in the Special Case. The defendants accepted the bill in its present form, knowing that they were to accept it in order that the engineer might discount it. The meaning of that acceptance as a matter of business is plain—namely, that the defendants when they accepted the bill on behalf of the company intended and knew that whoever took it would assume that the company had power to accept it and that the directors were authorised by the company to accept it. That was what the acceptance in that form means and represents, and it was done in order that the bill might be discounted. The bill was certainly not to be discounted by a person who knew that the company had no power to accept and the directors no authority to accept bills. The acceptance was intended to represent that such power and authority existed. The expression that the company have the power to accept bills, in a case where they may or may not have it, amounts to a statement that the company by their private Act have power to accept bills, and that the defendants were authorised by the company to accept the same. That is a statement of fact, which was made, not so as to deceive the person to whom it was actually made, but in order that the person who discounted the bill might be deceived and suppose that there was such authority. This is therefore a case where a representation of fact was made in order that it might be acted upon; it was acted upon by the person who it was intended should act upon it, and was a representation which was false to the knowledge of the person making it. The person who was deceived by it can therefore bring an action for damages.

BOWEN, L.J.—I am of the same opinion. The bill was accepted for and on behalf of the company by the directors and secretary; at the time when it was so accepted they must have known that it was intended to be used as an effective instrument, and

(1) 38 Law J. Rep. Exch. 59; Law Rep. 4 Exch. 102.
(2) 41 Law J. Rep. Chanc. 804; 44 Law J. Rep. Chanc. (H.L.) 20; Law Rep. 7 H.L. 102.
(3) 35 Law J. Rep. C.P. 205; Law Rep. 1 C.P. 499.
(4) Law Rep. 4 Ch. D. 693.
(5) 35 Law J. Rep. Chanc. 769; Law Rep. 2 Eq. 750.

no other explanation can account for their having signed it. They intended it to be used and to pass into the hands of a third person, who in this case is the bank. The effect of their signature is to make the acceptance a representation that they had authority to sign the bill on behalf of the company; and, as they intended that that representation should be acted upon by third persons, they are bound as acceptors to make it good. It was said that the representation was one which amounted to a representation of a matter of law. Where a representation is made as to the general law by one person to another, it is, in nine cases out of ten, made by a man who either does or does not know that that which he represents is a fact, and who takes upon himself the burden of equal knowledge. A representation of a matter of law is accepted at the risk of the person who does accept it upon the ground that the one knows the law as well as the other. I am not by any means prepared to say, and I doubt much whether a man who deliberately misstated the law to another, and thereby deceived him, would be allowed to retain any benefit derived from that representation. That question, however, does not arise here. In the present case a misrepresentation has been made as to the powers of a company which depended upon a private Act of Parliament. Suppose a person says to another with whom he is dealing, "I have in my private room a copy of a private Act of Parliament which gives me power to do this or that"—is not that an assertion of the existence in his room of a private copy of an Act of Parliament which contains particular provisions? That appears to me to be as much a representation of an existing fact as if he had said that he had in his room a copy of *Johnson's Dictionary*. It does not fall within that class of case in which a man makes an assertion as to a matter of law which another man has equal means with himself of knowing. I think therefore that the present case is one of a misrepresentation of an existing fact, and not of a matter of law; and consequently it does not fall within that class of circumstances to which Lord Justice Mellish referred in *Beattie* v. *Lord Ebury* (2). With regard to the case of *Rashdall* v. *Ford* (5) it is clearly distinguishable. There the plaintiff purchased a Lloyds' bond, not upon a representation as to its validity, but for what it was worth, and there was no allegation that he had been deceived.

FRY, L.J.—I am entirely of the same opinion. The defendants, by accepting the bill on behalf of the company, made in effect a representation that the company had power to draw and the directors to accept the bill. That was a representation of fact, and not of law; because, as has already been pointed out, the question whether the company had that power or not depended upon the provisions of a private Act of Parliament. A private right is in many cases a matter of fact. It is clear also that a plain representation of fact was here made with the intention that it should be acted upon, and it was in fact acted upon. I am further of opinion that the representation was false, and that the plaintiffs by reason of its falsity have sustained damage in respect of which they are entitled to maintain this action.

Appeal dismissed.

Solicitors—Shaw & Co., for plaintiffs; G. F. Jones, for defendants.

1884. Feb. 26. THE GUARDIANS OF THE PARISH OF LIVERPOOL (*appellants*) *v.* THE GUARDIANS OF THE PORTSEA UNION (*respondents*).

Poor—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 35—*Pauper—Order of Removal — Children under Sixteen—Birth Settlement of Father—Widowed Mother—Derivative Settlement.*

[For the report of the above case, see 53 Law J. Rep. M.C. 58.]

[IN THE COURT OF APPEAL.]

1884. May 13.

PALMER *v.* JOHNSON.*

Vendor and Purchaser—Particulars of Sale—Error in Description of Property—Condition for Compensation—Power to recover after Conveyance taken.

The particulars of certain freehold property sold by auction misstated the value of the rental, and the purchaser, relying on the statement, purchased the property for a sum higher than its real value or than he would otherwise have given. The contract of purchase contained a condition that if any error should be discovered in the particulars compensation should be allowed. The purchaser did not discover the error until after the purchase-money was paid and until after he had accepted the conveyance of the property. The conveyance contained no covenant relating to this matter:—Held, *that the purchaser was entitled to recover compensation, and that the acceptance of the conveyance did not bar his right to such compensation.*

Cann *v.* Cann (3 Sim. N.S. 447) *and* Bos *v.* Helsham (36 Law J. Rep. Exch. 20) *approved.*

Manson *v.* Thacker (47 Law J. Rep. Chanc. 312), Besley *v.* Besley (Law Rep. 9 Ch. D. 103) *and* Allen *v.* Richardson (49 Law J. Rep. Chanc. 137) *dissented from.*

Appeal from the judgment of Smith, J., on further consideration.

The case is reported *ante*, p. 78.

The action was brought by the purchaser of certain property put up for sale by auction to recover damages for a misstatement in the description of the property contained in the particulars of sale. These particulars described the property as having a net annual rental of 39*l.*; and upon the faith of that statement the plaintiff gave 650*l.* for the property. In August, 1882, the property was conveyed to the plaintiff, but the conveyance contained no covenants relating to this matter. In January, 1883, the plaintiff discovered, as the fact was, that the rental described as being a net rental of 39*l.* was a gross rental, the net rental being considerably below that sum.

The twelfth condition of sale was as follows:—

"The property is believed and shall be taken to be correctly described, but if any error, misstatement or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser as the case may require; the amount of such compensation to be settled, regard being had to the purchase-money, by the auctioneer, whose decision shall be final."

The auctioneer refused to adjudicate. The jury found that the plaintiff purchased the property believing that the net rental was 39*l.* They also found that there was no false and fraudulent representation. It was contended on behalf of the defendant that the action could not be maintained, inasmuch as the plaintiff had accepted a conveyance of the property.

Smith, J., on further consideration, gave judgment for the plaintiff.

The defendant appealed.

Lawrance, Q.C., and *W. Graham*, for the appellant.—The plaintiff cannot recover compensation for any error in the particulars, because he has accepted a conveyance of the property.

[BOWEN, L.J.—Ought not the action to be brought, if at all, against the auctioneer, as he has declined to adjudicate?]

It is not desired to take that point, although it would tell in favour of the defendant. The contention on behalf of the defendant is that the conveyance must contain the whole of the contract, and that the earlier conditions of sale are merged in that conveyance. *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2) are authorities against the defendant; but *Cann* v. *Cann* (1) is discussed by Malins, V.C., in *Manson* v. *Thacker* (3), where it was said that the decision must have been based on the ground of a fraudulent misrepresentation, and the Vice-Chancellor also dissented from the view of the law expressed in *Bos* v. *Helsham* (2). This last case cannot be

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

(1) 3 Sim. N.S. 447.

(2) 36 Law J. Rep. Exch. 20; Law Rep. 2 Exch. 72.

(3) 47 Law J. Rep. Chanc. 312; Law Rep. 7 Ch. D. 620.

distinguished from the present case, so that the Court of Appeal is now asked to overrule it. *Besley* v. *Besley* (4) and *Allen* v. *Richardson* (5) are both decisions of Malins, V.C., and are both in favour of the defendant, and so is the case of *Hart* v. *Swaine* (6) and the judgment of Williams, J., in *Jolliffe* v. *Baker* (7).

[FRY, L.J.—*Hart* v. *Swaine* (6) is not in point here, for that was a case of setting aside a contract on the ground of fraud.]

In *In re Turner and Skelton* (8), Jessel, M.R., followed the authority of *Bos* v. *Helsham* (2), and did not adopt the view of Malins, V.C.; but it is submitted that when two parties enter into a deed, that deed must be taken to contain the true contract between them; so that in this case the deed and the condition of sale must be taken to be conterminous, and the deed must put an end to the condition: for, as was said by Brett, L.J., in *Leggott* v. *Barrett* (9), where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties must in this second case be governed entirely by the deed.

[FRY, L.J.—That seems to be a sound statement of the law; but the question here is whether the whole of the preliminary contract has been reduced into the subsequent deed.]

Buszard, Q.C., and *Stanger*, for the plaintiff, were not called on.

BRETT, M.R.—In this case one point only has been argued, and that point is whether the plaintiff is entitled to recover damages for an error in the description of the property after the completion of the conveyance to him. The question is, whether where the particulars of sale by auction of real property contain a misstatement of fact, and where there is, as here, an express condition dealing with error, misstatement, or omission in the particulars of sale, the purchaser can recover compensation for such a misstatement after he has taken a conveyance of the property. This is not a case in which a person seeks after conveyance to set aside the conveyance on the ground of fraudulent misrepresentation, nor is it an action in any way in respect of a fraudulent misrepresentation, nor is it a case of erroneous assertions being made when there is no contract as to the way in which such assertions are to be dealt with.

The first point taken is as to what is the true construction of the twelfth condition. It is argued that the words "any error" in the particulars of the property refer only to the correct description of the property and to nothing else; but I do not think that they can be so confined—the condition applies to every kind of error and not to one kind alone. This contract is precisely the same in legal effect as that in *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2). Every point taken upon this appeal was obviously open on the argument of those cases, and we could not decide this case in favour of the appellant without overruling the ground of the decision in *Cann* v. *Cann* (1) and the decision itself in *Bos* v. *Helsham* (2). This contract is one which is contained in a matter of business which is of daily transaction in this country. *Bos* v. *Helsham* (2) was a deliberate decision of the Court of Exchequer upon demurrer with regard to a condition such as we find in the present case. An appeal lay from that decision; no appeal was brought; so that the decision, which is now eighteen years old, became known to all persons who had to deal with these matters. It appears never to have been challenged till now; and that decision itself was founded on a judicial statement of the law in *Cann* v. *Cann* (1), which was decided in 1830. Such being the case, I think that it has always been the legal practice, even of Courts of Error, to follow such a decision, even though they would not perhaps have given the same decision had the case come originally before them; and the reason for this is, that the decision has become known, has

(4) Law Rep. 9 Ch. D. 103.
(5) 49 Law J. Rep. Chanc. 114; Law Rep. 13 Ch. D. 324.
(6) 47 Law J. Rep. Chanc. 5; Law Rep. 7 Ch. D. 42.
(7) 52 Law J. Rep. Q.B. 609; Law Rep. 11 Q.B. D. 255.
(8) 49 Law J. Rep. Chanc. 114; Law Rep. 13 Ch. D. 130.
(9) Law Rep. 15 Ch. D. 306.

been acted upon, and has affected numerous transactions. Now this case is exactly the case which was under consideration in *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2), and I am of opinion that we cannot now set aside those decisions and say that they do not correctly express the law. There are two cases, however, in which Vice-Chancellor Malins expressed a different view; but I must say that, according to the comity of judicial tribunals in this country, one Court of co-ordinate jurisdiction should not, in a case in which there is an appeal, differ from another Court of co-ordinate jurisdiction. This being so, I think that other Judges were entitled not to follow these decisions of Vice-Chancellor Malins, but that they were entitled to follow the decision in *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2), as did Jessel, M.R., in the case of *In re Turner and Skelton* (8).

I do not say that strong arguments might not be used to shew that the cases of *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2) were not rightly decided; but even if that be true, still it does not follow we should have differed from those judgments had we heard those cases argued, and to me the reasons given by the Lord Chief Baron and by Baron Channell seem to be very strong; for it seems to me that when there is a contract in writing between two parties as to compensation for an error in the description of the property sold, and when there is no limit fixed as to the time in which the error has to be discovered, the Court would, if it assented to the arguments of the appellants, have to insert a limitation and to put a narrow construction on the general words which the parties themselves had not inserted. I do not therefore think that I should have decided those cases in a different way, and as at present advised I think I should have agreed with those decisions; but that is immaterial, for I wish rather to rest my decision on the principle that the two cases to which I have referred have been unchallenged for a long period, that they are decisions on matters which are dealt with daily in business, and therefore that we ought not now to disturb them. Several other cases have been cited, but I think it is unnecessary to make any remarks on any of them, except *Allen* v. *Richardson* (5) and *Besley* v. *Besley* (4); and of those two cases I must say that they are at variance with the cases of *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2), and that I think they cannot be supported. With regard to the judgment of Mr. Justice Williams in *Jolliffe* v. *Baker* (7), it must be said that, if it conflicts with the judgments in the two cases on which we base our decision, it must, in so far as it does conflict, be dissented from, and that the judgment of Mr. Justice Smith, from which this appeal is brought, is to be preferred. *Hart* v. *Swaine* (6) does not apply to this case; there a different kind of relief was sought, and Mr. Justice Fry had to find, as a juryman, that there had been fraudulent misrepresentation; the law which he had to apply in that case was clear, and differs from that which has to be applied to this case. It has been said that the statement of the law in *Leggott* v. *Barrett* (9) is at variance with what we are now deciding. I cannot see that there is anything wrong in the statement of law which I made in that case; but it does not apply to this case, as Mr. Justice Smith said in his judgment now under appeal, for, as he says, "It seems to me that the judgments in that case are manifestly distinguishable from the point under consideration. All that was there held was that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the completed contract is to be found in the deed, and the Court has no right whatever to look at the preliminary contract. In this case the preliminary contract as to compensation to be paid never was to be carried out by deed."

This appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. It must first be ascertained what the true interpretation of the original agreement is, then the enquiry must be made whether the parties have altered it. The intention of the parties must be considered, and the transaction itself must be looked at.

It has been argued that it is involved in the very nature of a transaction for the sale of land that the formal deed of conveyance must displace such a condition as

this; but it is quite possible to conceive a condition of sale which might have vitality after the sale and the execution of the formal deed of conveyance, so that it is necessary to consider what the true construction of the condition is. No doubt much might be said if there were no existing decisions, and it might be argued that such a condition as this only covers the interval before conveyance; but when in dealing with a condition of this kind, which occurs frequently in the usual course of business, it is found that the Courts have long since put a particular construction on a particular kind of condition, then I think the Court of Appeal is not free to alter that construction, and therefore that this question does not come before us as an open question, considering the case of *Cann* v. *Cann* (1) decided in 1830, and the case of *Bos* v. *Helsham* (2) decided in 1866. For I cannot think that the Vice-Chancellor Malins was entitled to dissent from those cases, one of which was a received authority and the other of which was dead in point. The late Master of the Rolls, moreover, took the same view in *In re Turner and Skelton* (8); so that I think *Manson* v. *Thacker* (3), *Besley* v. *Besley* (4) and *Allen* v. *Richardson* (5) cannot be considered as authorities on this point, and I agree with what the Master of the Rolls has said as to *Jolliffe* v. *Baker* (7).

FRY, L.J.—I am of the same opinion. The question is one of construction, and much might be said on both sides; but this condition has long been a common condition and much in use. A similar condition appears in *Cann* v. *Cann* (1), in 1830, so that it is plain that it was not then an uncommon condition, else it would not then have been adopted by the Court of Chancery in sales made under the Court. The decision in *Cann* v. *Cann* (1) was that the stipulation as to compensation referred not only to the time before the conveyance but also to the time after the conveyance. Then in 1866 the principles laid down in *Cann* v. *Cann* (1) were adopted in *Bos* v. *Helsham* (2), and although Vice-Chancellor Malins appears to have taken a different view in the later cases to which reference has been made, I agree with the rest of the Court in thinking that it is not desirable to interfere with the principle of construction which has been adopted with reference to this common condition, because numerous contracts have been entered into and numerous payments have been made on the footing that the law has been established to be what *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2) decide that it is.

The conveyance has not varied the contract; it is difficult to suppose that it can do so when the condition in the contract relates to a time posterior in date to the conveyance; and certainly the mere fact that there is a conveyance does not prove the existence of an intention to vary or to extinguish the earlier condition. In *Besley* v. *Besley* (4) and *Jolliffe* v. *Baker* (7) there was no express condition or stipulation such as exists in the present case, so that they do not bear upon this particular question.

In *Leggott* v. *Barrett* (9) the Court of Appeal laid down undoubted law, and the propositions contained in the judgments of Lord Justice James and the present Master of the Rolls are correct, and did they not already bind me I should be prepared to adopt them; but they do not affect this case, for the question there was whether there had been a contract for compensation which had been reduced into writing, but that is not the case here.

I agree therefore that this appeal must be dismissed.

Judgment affirmed.

Solicitors—Swann & Co., agents for Elborne, Nottingham, for plaintiff; Lee, Ockerby & Everington, agents for Bright, Nottingham, for defendant.

[IN THE COURT OF APPEAL.]

1884. May 16. } MORGAN *v.* THE LONDON GENERAL OMNIBUS COMPANY.*

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Omnibus Conductor—Workman—Person engaged in Manual Labour.*

An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of the Employers and Workmen Act, 1875, *s.* 10.

Appeal from a judgment of the Queen's Bench Division.

The action was brought in the Shoreditch County Court under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), to recover damages sustained by the plaintiff in consequence of a defect in one of the defendant company's omnibuses. The plaintiff was in the employment of the defendant company as an omnibus conductor, and received wages at the rate of 4*s.* a day, paid daily.

The County Court Judge nonsuited the plaintiff upon the ground that he was not a person to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), applied.

The Queen's Bench Division (Day, J., and Smith, J.) affirmed the decision of the County Court Judge.

The plaintiff appealed.

Leonard, for the plaintiff, contended that the plaintiff came within the class of persons specified in the Employers and Workmen Act, 1875, s. 10 (1), (2), and was a workman or person engaged in manual labour within the meaning of the section. *Wilson* v. *The Glasgow Tramways and Omnibus Company* (3), *Grainger* v. *Aynsley* (4) and *Shaffers* v. *The General Steam Navigation Company* (5) were referred to.

Sir H. Giffard, Q.C., *A. Cock* and *Beresford*, were not called upon.

BRETT, M.R.—The Courts in having to construe such an Act of Parliament as the one in question are put into the difficulty of having to bring to bear the knowledge which they have of certain employments, in order to see whether they come within the meaning of the Act. So the Court thought which tried this case, and therefore used that general knowledge which every one has of the employment of an omnibus conductor. The two questions are—first, as to the meaning of the Act of 1875; and, secondly, whether it applies to an omnibus conductor. That Act gives to certain workmen relief against certain injuries, which relief they never had before and could not have by the common law. The Legislature was not content with using the word "workman," but, according to the modern mode of drafting Acts of Parliament, an interpretation clause was added. Sometimes such a clause is used in this way: the Legislature says that a certain word shall include certain things. In that case you are left to say what is the ordinary meaning of that word in the English language; and then, in respect of anything which comes within that meaning, recourse need not be had to the interpretation clause. But as it is also said that the word shall include other things, it is the same as if the Legislature put "workman," and other specified classes of persons who are not workmen. An interpretation clause is also used in this way: a word is used which may have in the English language a smaller or larger meaning, but in the clause the meaning is confined, and

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

(1) 43 & 44 Vict. c. 42. s. 8: "For the purposes of this Act, unless the context otherwise requires, the expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

(2) 38 & 39 Vict. c. 90. s. 10: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract . . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

(3) Sess. Cas. 4th series, vol. 5, pp. 981, 988, 994 (Scotch).

(4) 50 Law J. Rep. M.C. 42; Law Rep. 6 Q.B. D. 182.

(5) 52 Law J. Rep. Q.B. 260; Law Rep. 10 Q.B. D. 356.

then it is provided "the expression 'workman' means," in which case the word "workman" is replaced by what comes after the word "means." It is obvious that by the use of the word "otherwise" in the Act of 1875, the draftsman understood that all the persons who were mentioned before were engaged in manual labour. They are people who are ordinarily known in the English language as working people who exercise manual labour. A carpenter or a bailiff or a parish clerk is not called a labourer. A "labourer" is a man who digs and does other work of that kind with his hands. A "journeyman" is a man who is working for a master, such as a carpenter. An "artificer" is a skilled workman, and a "handicraftsman" is the same. A "miner" certainly works with his hands. The section uses the words "any person otherwise engaged in manual labour"—that is, any person engaged in the same way as all the others are engaged, although they do not go by the same names. Now we must bring to bear our general knowledge of what an omnibus conductor is. His real and substantial business is to invite people into the omnibus and to collect the fares; no one would say that such a man was engaged in manual labour. It was said that in the Scotch case of *Wilson* v. *The Glasgow Tramways Company* (3), it was held that a tramway conductor earns his livelihood by manual labour within the meaning of section 10. I do not think that there is any valid distinction between such a person and an omnibus conductor. But we are not bound by that decision, and I beg leave to differ from it. I am therefore of opinion that the judgment of the Court below was right and should be affirmed.

BOWEN, L.J.—I am of the same opinion. The question is whether an omnibus conductor is within section 10 of the Act of 1875. In construing an Act of Parliament there is no more salutary rule than that the words are to be construed according to their ordinary use in the English language, unless something in the context or subject-matter shews that they should be construed otherwise. Here a statute has given certain relief to persons whom it calls workmen. It does not give it to all "workmen," but proceeds to define in an interpretation clause what it means by that word. An omnibus conductor cannot be called a "labourer" in the ordinary sense of the term. The words "otherwise engaged in manual labour" are plain, and can only mean those persons who are substantially engaged in labour performed by the hands. A conductor is not engaged in such labour. As to the case of *Wilson* v. *The Glasgow Tramways and Omnibus Company* (3), either the facts are distinguishable from the present case, so that the decision is not in point, or if they are not, I fail to understand how it is consistent with the language employed in the section.

FRY, L.J.—I am entirely of the same opinion. I fail to see that any of the words used in the Act of 1875 include an omnibus conductor. As to the Scotch case, one of the three Judges, Lord Gifford, expressly avoided touching on the question, and said that it was a difficult question which did not then require a decision.

Appeal dismissed.

Solicitors—Mackreth, Bramall & White, for plaintiff: Harrics, Wilkinson & Raikes, for defendants.

[IN THE COURT OF APPEAL.]

1882. July 13. } THE QUEEN *v.* WEIL.

Extradition—Arrest without Warrant —Prisoner in Custody—"Apprehension" —Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 8—*Jurisdiction—Court of Appeal —Criminal Matter—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19 *and* 47.

[For the report of the above case, see 53 Law J. Rep. M.C. 74.]

1884. May 28. } THE SOUTHEND WATERWORKS COMPANY *v.* HOWARD.

Public Health—Water—House without Proper Supply—Liability of Owner for Water Rates on Notice from Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 62.

The owner of a house who has failed to comply with the notice of the local authority to obtain a proper supply of water is liable, under section 62 *of the Public Health Act*, 1875, "*as if he had demanded a supply and were willing to pay water rates*," *to pay the water rates to the company which* "*furnishes the supply*" *by means of its mains in the street in front of his house, notwithstanding that no connection has been made between the house and the mains.*

The local authority may make the connection and charge it to the owner, but their so doing is not a condition precedent to the chargeability of the owner for water rates.

Case stated on appeal from the County Court of Essex in an action brought by a company incorporated by a local Act for the supply of water, among other places, to Prittlewell, in which parish the defendant was the owner of three houses, each of a less yearly value than 10*l.*

On the 1st of March, 1880, the surveyor to the Southend local board, being directed to report to them under section 62 of the Public Health Act, 1875, as to the water supply of Prittlewell, reported that each of the houses named in a schedule (which included, among upwards of two hundred others, the defendant's three houses) was without a proper supply of water, and that a supply could be furnished to the houses in question at a cost not exceeding the water rate authorised by the Local Waterworks Act.

After giving a notice, which was not complied with, to the defendant, among the other owners, to obtain a proper supply of water for his three houses, and to do all such works as might be necessary, the local board, on the 15th of March, 1882, entered into an agreement with the plaintiffs for the supply of water to the houses. The plaintiffs accordingly laid mains, one of which passed along the street in front of the defendant's houses, and about fifteen feet from them. On the work being completed, the local board served, on the 22nd of May, 1882, a further notice on the defendant, among the other owners, reciting the agreement and the facts, and requiring him within three months to cause the necessary connections with such pipes to be made for the purpose of obtaining a supply of water. The defendant did not comply with the notice, or with a similar notice served on the 9th of October, 1882. The action was brought for rates from the 29th of September, 1882, and it was admitted that if the rates were recoverable at all in respect of these houses the amount claimed was recoverable from the defendant. The County Court Judge gave judgment for the plaintiffs.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62, it is enacted as follows:—"Where, on the report of the surveyor of a local authority, it appears to such authority that any house within their district is without a proper supply of water, and that such a supply of water can be furnished thereto at a cost not exceeding the water rate authorised by any local Act in force within the district, or, where there is not any local Act so in force, at a cost not exceeding twopence a week, or at such other cost as the Local Government Board may, on the application of the local authority, determine under all the circumstances of the case to be reasonable, the local authority shall give notice in writing to the owner, requiring him, within a time therein specified, to obtain such supply and to do all such works as may be necessary for that purpose.

"If such notice is not complied with within the time specified, the local authority may, if they think fit, do such works and obtain such supply, and for that purpose may enter into any contract with any water company supplying water within their district; and water rates may be made and levied on the premises by the authority or company which furnishes the supply, and may be recovered as if the owner or occupier of the premises had demanded a supply of water and were willing to pay water rates for the same, and any expenses incurred by the local authority in doing

any such works may be recovered in a summary manner from the owner of the premises, or may by order of the local authority be declared to be private improvement expenses."

Edward Pollock, for the defendant.—The first notice given was premature, as the mains were not then laid, and the County Court Judge so decided in the defendant's favour. The question is whether, on the strength of the second notice, the plaintiffs are entitled to recover the rate. The rate cannot be recovered unless, in the words of the section, the local authority "have obtained such supply"—that is, a proper supply of water to the house. The local authority have not obtained a supply, but have only brought the water in the main within fifteen feet of the defendant's houses. The local authority ought first to have connected the defendant's premises with the mains, as the section empowers them. Again, the plaintiffs are not the company which "furnishes the supply," they only offer it fifteen yards off and call upon the defendant to furnish himself with the supply.

R. S. Wright, for the plaintiffs, was not called upon.

STEPHEN, J.—I am of opinion that the decision of the County Court Judge must be affirmed. The question turns on section 62 of the Public Health Act, 1875. There is no dispute as to the meaning of the section down to the end of the first paragraph. The section assumes that water has been supplied to the district, and the object of it is to bring the water into the house. Perhaps the words are not sufficiently clear, but it is not difficult to see what the section means and to reduce it to popular language. There must first be a report of the surveyor, on the strength of which it must appear to the local authority that the house is without a proper supply of water. The local authority then gives notice to the owner to obtain the supply. If the notice is not complied with, the local authority may do works or enter into any contract with the water company. But in this case no connection has been made between the houses and the water mains. The local authority has power to make the connection and charge the cost to the owner, but they have not been minded to do so. I think they may make a contract with the water company to make the mains, leaving it to the owner to make the connection. It is a small question whether the local authority is bound to make the connection and charge it to the owner, or may leave it to him to do as he pleases, so that if he does not make the connection he must pay rates without water. It is just as reasonable to make him do this, as it is to make him pay rates although he does not drink the water.

MATHEW, J.—I am of the same opinion. This is a case of a person who is reluctant to have a supply of water. He is put in the position of a person who is willing to pay the water rates. That is the meaning of the section; and a person who is willing to pay water rates makes the connection for himself.

Judgment affirmed.

Solicitors—Digby & Tabor, agents for A. J. Arthy, Rochford, for appellant; Bircham & Co., agents for Cooper & Davies, Norwich, for respondents.

[IN THE COURT OF APPEAL.]

1884. Jan. 28. THE QUEEN (*on the prosecution of* BERKELEY) *v.* THOMPSON AND OTHERS.

Bastardy — Jurisdiction — Service in Scotland of Summons issued in England —Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3 *and* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 51 *and* 54—*Summary Jurisdiction* (*Process*) *Act*, 1881 (44 & 45 *Vict. c.* 24), *s.* 6.

[For the report of the above case, see 53 Law J. Rep. M.C. 65.]

[IN THE COURT OF APPEAL.]

1884.
March 15, 17, 24, 25. } STOCK *v.* INGLIS.*

Ship and Shipping—Marine Insurance—Policy on Goods—Contract of Sale—Free on Board—Loss of Goods—Non-appropriation of Goods at Time of Loss—Vesting of Property—Insurable Interest.

The plaintiff claimed to recover from the defendant, an underwriter at Lloyds', under a floating marine policy on goods, in respect of certain sugar lost on the 4th of February, 1881, *on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff (a merchant at Bristol) and B. & Co. as hereinafter mentioned.*

By the first contract, dated the 7th of January, 1881, *D. & Co. agreed to sell to B. & Co.* 200 *tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at* 21*s.* 9*d. per ton net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the 12th of January,* 1881, *D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the 7th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of* 200 *tons of sugar at an advanced price; neither was the plaintiff aware that D. & Co. were the shippers of the* 200 *tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price which left the plaintiff a clear profit. D. & Co. advised their Hamburg forwarding agents that they had sold* 400 *tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co.'s forwarding agents at Hamburg shipped* 3,900 *bags only, and advised D. & Co. of this short shipment, proposing to send the* 100 *bags short-shipped by the next steamer. The* 3,900 *bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co.'s agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole* 3,900 *bags were shipped in one undistinguished mass, consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the* 3rd *of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co., in due course, took up the bills of lading, and then proceeded to apportion the* 3,900 *bags, appropriating* 2,000 *of such bags to B. & Co., and the remaining* 1,900 *to the plaintiff, and making out invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co.; but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the* 200 *tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these* 200 *tons. Upon receipt of the invoices, the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the* 2,000 *bags so invoiced. The plaintiff then also declared upon his float-*

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

ing policy for this further loss:—Held, *that inasmuch as the plaintiff was liable to pay for the sugar, lost or not lost, he had such an insurable interest as would entitle him to recover in respect of the loss under a policy on "goods."*

Judgment of FIELD, J. (52 Law J. Rep. Q.B. 30) *reversed.*

Appeal by the plaintiff from a judgment of Field, J., on further consideration. The case is reported 52 Law J. Rep. Q.B. 30, where the facts will be found set out at length.

C. Russell, Q.C., R. T. Reid, Q.C. (with them *Danckwerts*), for the appellant.—The question is whether the plaintiff had an insurable interest, and it is submitted that this case and this policy fall within the doctrine laid down in *Lucena* v. *Craufurd* (1), that any right arising out of the contract about the property is an insurable interest. The plaintiff had a right to insure these goods even though they were unascertained, because they were by agreement at his risk; for, as was said by Willes, J., in *Joyce* v. *Swan* (2), even if by reason of special circumstances the property does not pass on shipment, yet by reason of the risk the buyer may insure the cargo in respect of the interest he has in it; and Lord O'Hagan approved of that view of the law in *Anderson* v. *Morice* (3). An insurable interest is an interest in an event on the happening of which the party will gain an advantage, and in the case of the frustration of which he will suffer a loss—*Lucena* v. *Craufurd* (1) and *Wilson* v. *Jones* (4); and if the plaintiff had rendered himself liable to a risk he has an insurable interest even though no property passed—*Castle* v. *Playford* (5). The insurable interest of the plaintiff must depend on his rights, and not on his obligations, although either a right belonging to him or an obligation imposed on him is sufficient to give him an insurable interest. The plaintiff had a right to demand 200 tons out of the bulk, and it is enough to support this claim if he could in any event gain an advantage; he was, moreover, bound to take the 200 tons, and liable to pay for them, for by the agreement they were to be at his risk, and he would be bound to pay whether they arrived or not.

In *Anderson* v. *Morice* (3) the House of Lords was equally divided in opinion, so that the judgment of the Exchequer Chamber stood; but the circumstances of this case do not bring it within that case, for the House of Lords there considered that the contract was a contract for a cargo, and that the loss happened before the cargo was loaded, so that no cargo was in existence, and the risk had not begun—the condition precedent, therefore, to the insurer's risk arising had not been fulfilled; whereas in this case the risk of the plaintiff had already begun. It is clear that Lord Hatherley considered that a contract might be made under which goods shipped may be at the risk of the purchaser, even though the property has not passed, and even though the purchaser is not bound to pay until he has received the documents; and all the Lords adopted the principle for which the plaintiff contends, although the House was not unanimous in considering that it applied to the facts of that case.

Hill v. *Secretan* (6) and *Jackson* v. *Anderson* (7) were also cited.

Cohen, Q.C., and *G. Barnes*, for the defendant.—The course of business between these parties does not support the contention of the appellant that Drake & Co. could, after the loss was known, appropriate goods to the contract, and thus make the plaintiff responsible for the price of them. In this case it does not clearly appear whether the appropriation was made before or after the loss was known; but Drake & Co. did not know of the plaintiff at that time, so that they could have had no intention of delivering the goods f. o. b. to the plaintiff. The sugar was not shipped at all in performance of any contract for a specified quantity with the plaintiff, and no specified quantity of

(1) 2 Bos. & P. N.R. 269.
(2) 17 Com. B. Rep. N.S. 84.
(3) 46 Law J. Rep. C.P. 11; Law Rep. 1 App. Cas. 713, at p. 742.
(4) 36 Law J. Rep. Exch. 78; Law Rep. 2 Exch. 139.
(5) 41 Law J. Rep. Exch. 44; Law Rep. 7 Exch. 98.
(6) 1 Bos. & P. 315.
(7) 4 Taunt. 24.

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200 tons was put on board for him. The property therefore had not passed to the plaintiff, and there were no goods which could in any sense be said to be at his risk.

Next as to the question whether the plaintiff had an insurable interest in the goods: An insurable interest whilst the risk is still pending, and at the time of the loss, is sufficient—*Arnould on Marine Insurance* (8). A mere agent without possession or lien has not an insurable interest to the extent of the value of the goods simply because his name appears in the bills of lading instead of that of his principal; to constitute an insurable interest against a peril there must be an interest such that the peril would by its proximate effect cause damage to the assured—*Seagrave* v. *The Union Marine Insurance Company* (9). The case of *Castle* v. *Playford* (5) shews that the contract is merely a contract of indemnity, and not a contract that the goods shall not be damaged. The assured must, in order to have an insurable interest, be the legal owner of or have a beneficial interest in the property—*Ebsworth* v. *The Alliance Marine Insurance Company* (10). No doubt profits may be insured, but that is because they form an additional part of the value of the goods in which the party has already an interest—*Stockdale* v. *Dunlop* (11). The Court of Common Pleas in *Anderson* v. *Morice* (3) thought that, although the assured was under no obligation to pay for the goods, yet he might have taken them, and so have become liable to pay for them — and this, in their opinion, gave him an insurable interest; but that was the only point on which the House of Lords differed from them.

Upon the question as to the passing of property in goods by appropriation subsequent to the contract, *Blackburn on Sale* (12) was cited; also as to the meaning of the term "f. o. b.," *Brown* v. *Hare* (13) and *Benjamin on Sale* (14).

Jackson v. *Anderson* (7) and *Hill* v. *Secretan* (6) were also referred to.

Reid, Q.C., in reply, referred to *Cowasjee* v. *Thompson* (15).

BRETT, M.R.—It seems to me that where underwriters, after the assured have paid the premium, take the objection after the loss that there was no insurable interest, it is a technical objection, and one which no doubt is admitted by the law; but it has no real merit, certainly not as between the assured and insurer; and for many years I have always had the strongest conviction that the Court ought to lean in favour of an insurable interest. The Court in so doing must not, of course, assume facts which do not exist, nor must they stretch the law beyond its proper limits. It seems to me that it was proved in this case that there was in Bristol in the sugar trade a course of business to this effect: that an amount of sugar is shipped on board by a particular shipper from Hamburg to Bristol sufficient to fulfil the orders received from Bristol, and that as the price of sugar depends upon the saccharine matter contained in the sugar—it being impossible to be very precise as to shipping the exact amount of saccharine matter to which a particular contract is entitled—the course of business is that the shipper should take bills of lading of small quantities of the sugar, so that when he sees the analyses of the sugar he may, by distributing the bills of lading according to those analyses, allocate to each contract, out of the sugar which is on board the ship, and which is shipped with the intention of fulfilling all the contracts, the bills of lading which represent as near as possible the amount of saccharine matter due to each contract. It seems to me that whether that allocation of saccharine matter and distribution of the bills of lading could or could not have been, it never was made before shipment, and that the course of business was to make it afterwards in England.

(8) 5th ed. p. 59.
(9) 35 Law J. Rep. C.P. 295; Law Rep. 1 C.P. 803.
(10) 42 Law J. Rep. C.P. 305; Law Rep. 8 C.P. 596, 637.
(11) 6 Mee. & W. 224, 232; 9 Law J. Rep. Exch. 83.
(12) At p. 126, *et seq.*
(13) 4 Hurl. & N. 822; 29 Law J. Rep. Exch. 6.
(14) 3rd ed. p. 315.
(15) 5 Moore P.C. 165, 173.

The inference I draw from the evidence is that that was the course of business. It was also proved that the plaintiff had had dealings in the sugar trade at Bristol, and had made many contracts of the same kind with the persons who had sold him the sugar in question. That being the course of business as regards the seller, the sugar to which the buyer would be entitled depended upon the distribution of the bills of lading according to the analyses; and upon that distribution also depended, within small limits, the exact price which a buyer might have to pay for a lot. I also draw the inference that the plaintiff did know of this course of business; and, if that be so, it was known to both the plaintiff and the defendant when the contract of purchase was made. In this case it is not only necessary to suppose that the plaintiff knew it, but it seems to me that Beloe also knew it, and I come to the conclusion that all persons who were dealing in sugar between Hamburg and Bristol knew of this course of business. Under these circumstances a contract in writing is made for the purchase of a certain quantity of sugar upon the terms f. o. b. The question is not what is the meaning of a contract made by individuals who did not know the course of business, but who would nevertheless be bound by the custom of the market, but what is the true construction of the written contract made under the circumstances mentioned.

The knowledge of the contracting parties is a circumstance to be taken into consideration in order to construe the contract; and then comes the question as to the meaning, as between those parties, of the words "f. o. b." It is not denied, if specific goods are dealt with by the contract, that those words, according to the general understanding of merchants throughout the whole of England, mean more than that the shipper is to put goods on board at his own expense and on account of the person for whom they are shipped. I think it cannot be denied that the goods are shipped on account of the purchaser, who runs the risk of their being lost before the ship arrives. That is the meaning of the words as applied to specific goods, even though payment is not to be made on the delivery of the goods on board, but at some other time, and even though the bill of lading is forwarded by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted the bills or paid cash.

The goods are delivered on board the ship on account of the purchaser, who, however, will not be entitled to actual delivery on the arrival of the ship at its port of destination until he has paid for the goods according to the terms of his contract which is against the documents, or otherwise as the agreement may state. Then arises the question whether a contract can be made with the term "f. o. b.," which can be fulfilled without the delivery of specific goods at the time of the shipment. Can such a contract be made with regard to the sale of a part of a cargo in bulk—that is, is there any mercantile or legal reason why the parties should not agree to sell so much out of a bulk cargo on board of or *ex* such a ship, upon the terms that if the cargo be lost the purchaser shall bear the loss? I see no reason why such a contract should not be made, nor why it should not be a contract to buy and sell a certain quantity *ex* ship or *ex* bulk if the term "f. o. b." is put into it. If such a contract can be made, some meaning must be given to that term. The only meaning that could be given to it is that which is given to it when goods are attributed to the contract. What is there unreasonable, or contrary to business or to law, in that term meaning that where twenty out of fifty tons are sold upon the terms that the purchaser shall pay a certain price for those twenty tons, but the seller shall pay the costs of shipment—that is, f. o. b.—the purchaser shall bear the risk whether they are lost or not—or, in other words, shall pay for the goods whether they arrive or not? It does not seem to me that there is anything more inconsistent either in business or law that the parties should make such a contract with regard to a portion of the cargo than if they made it with regard to the whole cargo or with regard to a specific portion of a cargo. I can see nothing either illegal or unbusiness-like in such a contract, and the only question therefore remains whether there is such a contract.

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It seems to me, taking into account the circumstances with regard to the course of business being known to both buyer and seller, that both the contracts made by Drake & Co., the one with the plaintiff and the other with Beloe, were made upon the terms that the buyer should pay for the sugar as it might be distributed either before or after the arrival of the ship, at the time when the bills of lading were to be offered to the buyer that they might be distributed then, and that he should be bound, if the goods arrived, to take those which were allocated to him by the seller, with this further term, that the seller would not run the risk of their arrival in this country, and that the buyers should be bound to pay the price against that allocation of the bills of lading whether the goods arrived or not. If the bills of lading were presented to him before the arrival of the ship, then neither party would know of the loss, and the purchaser would be bound to pay against the bills of lading. If when the bills of lading are presented to him the goods have been lost, he must pay for them notwithstanding, because, by the bargain, that was the risk which he took upon himself. Therefore, if that be true, the plaintiff, when Beloe sold to him the sugar which he had bought, became liable, not directly to Drake & Co., but to Beloe, to pay for the goods whether they arrived or not, and also liable to Drake & Co. to pay for the other goods whether they arrived or not. If that be so, then upon the non-arrival of the goods he would suffer a money loss. The question, therefore, which has been propounded about *Anderson* v. *Morice* (3) does not arise. It is not only that the plaintiff would not make gain, but that he would suffer a pecuniary loss. Under these circumstances, it seems to me that he has an insurable interest, and there is no case to the contrary effect. The moment the true construction of the contract is arrived at, it falls within the plain rules relating to insurance; it is therefore unnecessary to go through the cases relating to insurance, because, under the circumstances, there can be no doubt that the plaintiff has an insurable interest. The meaning of the contract as applied between these parties to the circumstances which were known to both of them, and which were in existence, make it to my mind the proper decision that the goods were put on board at the risk of the buyer at the moment when they were put on board. If that be so, our judgment must be in favour of the plaintiff.

BAGGALLAY, L.J.—I am of the same opinion. The plaintiff is entitled to succeed, upon the ground that at the time of the loss the goods were at his risk. The argument in support of that view is based upon two reasons: first, upon the fact that the contract was for goods f. o. b., and secondly, upon the general course of business as far as regards this particular class of business. It has not been denied that where a contract deals with specified goods, the introduction of the provision "f. o. b." places the goods at the risk of the buyer. But it was suggested that there is a difference where the goods are not specified, but are, as in this case, a certain proportion of goods to be delivered out of a larger quantity. The argument addressed to the Court in reply, to the effect that no authority has been cited to shew that there is such a difference, is a forcible one. I think that the suggestion of Mr. Reid, that there is no reason arising out of mercantile inconvenience for such a difference, is very difficult to answer, and if I was called upon to decide it, so far as that contention is concerned I should prefer to look more into the matter, and if called upon to express an opinion off-hand I should assent to that argument. I prefer, however, to rest my decision upon the second contention which was urged by Mr. Reid—namely, as to the general course of business in relation to transactions of this kind. I think it impossible to come to any other conclusion than that this course of appropriation of the bills of lading with reference to the analyses of the different sugars which were the subject of the different bills of lading was the ordinary course of dealing in transactions of this character; and, upon the necessary inferences to be drawn from the admitted facts, both of the parties must be assumed to have been aware of it.

The goods therefore being at the risk of the purchaser at the time of the loss, he had an insurable interest in them which he had a right to claim.

LINDLEY, L.J.—This action is brought upon a policy effected upon goods; the only question, therefore, which we have to consider is whether the plaintiff had an insurable interest in the goods so insured. The plaintiff's interest, whatever it was, arises out of a contract, the meaning of which contract must first be ascertained. I will only take one contract, because the other is much in the same terms. That contract is for 200 tons of sugar "f. o. b." at Hamburg, the sugar to answer a certain description as regards sweetness, and so on, and the price to be paid in London in cash in exchange for the bills of lading. Looking at that contract by itself, and without reference to any particular course of trade, the first thing that strikes one on reading it is that no particular sugar is specified. It is for 200 tons of sugar, and I apprehend that the contract might be performed in one of two ways. The 200 tons might be shipped f. o. b. at Hamburg, so as to be appropriated at the time of shipment by the buyer. That would be the ordinary mode of performing the contract if there was nothing else in the case; and the sugar, provided that it answered the description, would then be appropriated at the time of the shipment: the property in it would pass to the buyer, and it would be at his risk. The contract, however, might be performed in another way, and here it is that the only difficulty occurs to my mind, and it is a question of fact. It is unquestionable, as I understand the facts, that Drake & Co.—the sellers—conducted their business in a particular way, and that the plaintiff, who was a merchant at Bristol, had for a considerable number of years had dealings with Drake & Co., and knew their course of business, up to a certain point at all events; and it is to my mind established beyond all question that it was not always the course of business of Drake & Co. to appropriate the sugar to each buyer at the time of shipment, but to ship more than enough to satisfy all the contracts for sugar deliverable at a particular port, and then, after the shipment, to apportion the larger portion so shipped amongst the buyers at that port. It is plain that that was their course of business, and that the plaintiff was aware of it—to this extent at all events, that having had dealings with them for years he had been in the habit of insuring what he had bought the moment it was shipped. But what is left in obscurity is whether the plaintiff knew it was Drake & Co's. course of business to ship several parcels in one ship, and then to appropriate to each contract a portion of the cargo so shipped. At one time I understood a passage in the judgment of Mr. Justice Field, to which attention was drawn, as negativing a knowledge on the part of the plaintiff that that was the course of business followed by Drake & Co. But, on looking at it a little closer, I do not think that that was what Mr. Justice Field meant; and if we can arrive at the conclusion as a matter of fact that the plaintiff knew that the course of business was to perform contracts of this kind in the manner in which Drake & Co. were in the habit of performing them, it appears to me that all further difficulty vanishes. My only difficulty is as to a question of fact; but, upon the whole, I come to the conclusion that I must draw the inference that the plaintiff must have known it, and that the passage which raised a considerable doubt in my mind, and which looks to the contrary, is to be properly understood as meaning that it was not known that it was the habit of Drake & Co. to apportion after a loss. The difficulty does not arise if the passage is so read. I shall assume that I am right in inferring as a matter of fact that the plaintiff did know that it was the course of business of Drake & Co. to perform such a contract as this, not simply by appropriating sugar to each contract at the time of shipment, but by shipping enough to satisfy the demands of all the buyers, and then to appropriate certain bags of sugar to each contract after shipment. The contract must be looked at in order to see what it means with reference to that knowledge on the part of both buyer and seller. It might have

been performed according to the intention of both parties in the way in which Drake & Co. actually performed it—that is to say, they might have shipped 200 tons and some more to answer the contracts with the plaintiff and Beloe, and with any other person with whom they might have contracted for delivery of sugar at Bristol, and it would have been in accordance with the course of business and with the intention of both parties that the quantities shipped to answer each contract should be at the risk of the buyers. There is nothing in point of law to exclude such a contract as that. The only question is whether that is the contract here. It was said that there cannot be a contract at the risk of the buyer—that is, that the buyer is to pay for the goods shipped, lost or not lost—unless the goods have been appropriated to him. That seems to me to put the general proposition too wide. I see no difficulty in a party, if he so choose, agreeing to buy the sugar in bulk, and to pay for it when it is appropriated, the appropriation taking place during the transit. Whether that is the meaning of the contract in question is a different matter; but, having regard to the course of business and to the evidence, from which I infer that the plaintiff did know that this was the mode in which the contract was performed, it seems to me that we are driven to the conclusion that there was no appropriation of goods so as to pass the property from Drake & Co. to the plaintiff. Agreeing with Mr. Justice Field in that part of his judgment, it seems to me that, although it is made out that the property did not pass, it was the intention of these parties that the 200 tons, part of this cargo, should be at buyer's risk. If that is once conceded, there is no further difficulty, because no authority has been cited which establishes that a man who is liable to pay for goods has not got an insurable interest in them. The case of *Anderson* v. *Morice* (3) is not an authority against the proposition that a man has an insurable interest in goods, whether he has the property in them or not, if he is liable to pay for them. Under these circumstances the plaintiff had an insurable interest, and that part of the judgment of Mr. Justice Field which proceeded almost entirely upon the ground that he had no insurable interest cannot be supported.

Appeal allowed.

Solicitors—Hollams, Son & Coward, for plaintiff; Waltons, Bubb & Walton, for defendant.

1883. May 10, 11. 1884. Feb. 9. } THE QUEEN *v.* LABOUCHERE.

Criminal Information—Defamation—Leave to File Information when granted—Libel on Deceased Person—Foreign Nobleman—Application by Person not resident in the United Kingdom.

Application having been made to the Court for leave to file a criminal information by a foreign nobleman not resident in this country, in respect of a libel on his deceased father published in an English newspaper,—

Held, *that the Court, in the exercise of its discretion, must refuse the leave, being guided by the following principles:—*

(*a*) *The non-residence of the applicant in this country, as rendering it unlikely that any breach of the peace will follow, is a cogent argument, though not conclusive, against the interference of the Court.*

(*b*) *The fact that the subject of the libel is dead is, upon the weight of the authorities, an objection which the Court will regard as almost conclusive against allowing an information to be filed.*

(*c*) *To entitle a person to ask the Court for a criminal information he must occupy some public office, and the libel complained of must attack him in relation to such office, not as a private person. A peer, in private matters, is not entitled merely as a peer to the interference of the Court.*

This was an application on the part of the Duke of Vallombrosa, calling upon Mr. Labouchere, as the proprietor of *Truth*, to shew cause why a criminal information should not be filed against him for a libel published in that newspaper upon the father of the applicant.

The Queen v. *Labouchere.*

The applicant was a foreigner not resident in this country, and his father, the subject of the libel, was dead.

The libel itself appears set out in the judgment of the Court.

C. Russell, Q.C., and *Poland* (on May 10 and 11, 1883) shewed cause.—The first point, that the fiat of the Director of Public Prosecutions has not been obtained, will depend on the decision in *The Queen* v. *Yates* (1), which the Court is considering. The next point is that this is not a case for the extraordinary remedy of an information, but the prosecutor must be left to his remedy by indictment or action.

Then the applicant is not resident in England, he owes no allegiance to the country, and never had a domicil there.

Again, this is an allegation respecting a deceased ancestor, not a libel on a living person, and the Court will not grant an information in such a case.

Lastly, the applicant has no official or political position in the government of any country—he is merely a private individual, though he has a title.

The Court then called on

Sir H. S. Giffard, Q.C., and *Archibald.*—The offence was committed by publication in this country within the jurisdiction of the Court. No case can be found saying that a foreigner may not apply; domicil is immaterial. Then it is not necessary that the applicant should be in a political or official position—*The Queen* v. *Gregory* (2).

[LORD COLERIDGE, C.J., referring to *The King* v. *Kinnersley* (3), Lord Clanricarde's case, asked if that would be followed now.]

The libel there was really imputing bigamy. The occupancy of a high official position is an element in the exercise of the discretion of the Court. The only principle is that in important cases the Court will interfere, in trumpery ones they will not—*The Queen* v. *Murray* (4). Recently an information was granted for a libel on the directors of the Army and Navy Stores. There was no public position in *Achilli* v. *Newman*, where an Italian had an information granted. Recently an information was granted where the applicant held no office, but was the son of a peer, Leveson Gower.

Then the libel, though referring to a dead man, is an imputation on the family, and really is a libel on the applicant himself.

[LORD COLERIDGE, C.J.—Is there any instance where the applicant himself not being libelled the Court granted an information where no breach of the peace was likely?]

In *Topham's Case* (5) Lord Kenyon says a man may so speak ill of the dead as to libel the living. This is not an historical discussion, the paragraph was directed against the applicant himself; it is not necessary to say whether it would provoke a breach of the peace. A libel is not the less a libel because on a Quaker who would not break the peace under any written provocation.

[LORD COLERIDGE, C.J.—The granting of an information is discretionary; the defendant has now said that the imputation is untrue; why should the Court go out of its way to grant to a foreign duke what other persons do without?]

C. Russell, in reply.—The whole foundation for treating libel as a crime is its tendency to provoke a breach of the peace. Informations for libel on private individuals are only granted where the charge is one of great enormity which the Court has thought required prompt redress. In *Prynne's Case* (6) Sir Francis Winnington attacked the legality and practice of informations, and this very likely led to the statute 4 & 5 Will. & Mary, c. 18, which prohibited them except as the judicial acts of the Court.

He cited also *The King* v. *Critchley* (7), *The King* v. *Alderton* (8), *The King* v. *Williams* (9), *The Queen* v. *Lord G. Gordon* (10), *The King* v. *D'Eon* (11), *The King* v. *Vint* (12), *The King* v. *Peltier* (13),

(1) 52 Law J. Rep. Q.B. 778.
(2) 8 Ad. & E. 907.
(3) 1 Wm. Black. 294.
(4) 1 Jur. 37.
(5) 4 Term Rep. 126.
(6) 5 Mod. 459.
(7) 4 Term Rep. 129.
(8) Sayer, 280.
(9) 5 B. & Ald. 595.
(10) 22 How. St. Tri. 176.
(11) 1 Wm. Black. 510; 3 Burr. 1513.
(12) 27 How. St. Tri. 627.
(13) 28 How. St. Tri. 529.

The King v. *Pocock* (14) and *Ex parte Chapman* (15).

Conceding that there are instances of informations being granted on the application of private individuals for private libels, the principle, it is submitted, should be otherwise. There is the remedy by indictment open, and if the article is a libel on the applicant himself he can bring an action.

Cur. adv. vult.

The judgment of the Court (16) was (on Feb. 9, 1884), delivered by

LORD COLERIDGE, C.J.—This was a case in which a foreign nobleman applied to this Court for a rule calling on the defendant, the proprietor of the newspaper *Truth*, to shew cause why a criminal information should not be filed against him in this Court for a libel published in his paper upon the deceased father of the foreign nobleman. The applicant resides abroad, and the affidavit on which the rule was moved for was sworn out of the country. The alleged libel stated that the father of the applicant had been "an army contractor, who was nearly hanged on a charge of supplying as meat to a French army corps the flesh of soldiers who had died in hospital or who had been killed in battle. Luckily for him the First Empire came to an end before his trial could take place, and the contractor having retired to Italy and purchased a dukedom, became a grand seigneur and an ardent adherent of the Bourbons."

Several points were made against the rule—that the applicant was a foreigner, and a foreigner not residing or even sojourning in this country; that the subject of the paragraph was not the applicant, but the applicant's deceased father; that in any view it was not a case in which this Court in its discretion would interpose by way of extraordinary remedy, but would leave the applicant to indict or bring an action. There was another point, as to the fiat of the Attorney-General; but as upon this point the Court has already given judgment in the case of *The Queen* v. *Yates* (1), and as on that point of law the decision of the majority of the Court binds us, it is not necessary to notice this question further.

As to the point that the present Duke of Vallombrosa, the applicant, is neither resident nor sojourning in this country, it may be sufficient to observe that we do not intend to lay it down as a rule of law that this Court will not interfere under any circumstances by way of criminal information on the application of a person so situated. Cases may be put, or may actually arise in fact, in which this Court would interfere beyond all question, if the person applying to it were an English subject or were resident in England; and the single fact that the applicant was situated as the applicant is situated here might not in such a supposable case be an answer to the application. But it is obvious that, if we have regard to the principles on which from very early times this Court has acted, the non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it, as a general rule, very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also, generally speaking, very unlikely that in fact any breach of the peace will follow. It is a matter, therefore, very important for the Court to consider when the appeal is to its discretion: a reason further why, in the exercise of that discretion, the Court should be unwilling to interfere. We do not preclude the duke from his remedy, if he thinks fit to pursue it, by way of action or indictment; but, in this particular case, we should be prepared on this ground to discharge the rule.

Next, as to the point that the subject of the libel is dead—the authorities are not absolutely conclusive, but it seems to us that the weight of the authority inclines upon the whole in favour of the objection. The *locus classicus* upon this subject is the judgment of Lord Kenyon in *The King* v. *Topham* (5). He points out (at p. 128) that the general statement in 5 Rep. in the case *De Libellis Famosis* (17), that publications defamatory

(14) Stra. 1157.

(15) 4 Ad. & E. 773.

(16) Lord Coleridge, C.J., Denman, J., Field, J., Hawkins, J., and Mathew, J.

(17) 5 Co. Rep. 125*a*.

of dead persons are libellous, was a statement extra-judicial, that it did not go to the point in judgment, and that the judgment might well have been sustained without going into it. He shews further that the point in *Hawkins* (18), which deals with informations as well as ordinary indictments, puts the whole criminality of libels on private persons, as distinguished from the civil liability of those who publish them, on their tendency to disturb the public peace. Hawkins, indeed, in a passage immediately following the words quoted by Lord Kenyon, puts his own view beyond all doubt, and shews that he would have discouraged, or even disallowed, many of the indictments for libel, to say nothing of informations, with which the Courts of late years have been occupied. For he says, "The Court will not grant this extraordinary remedy, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual, for the malicious publication of even truth itself" (this, it must be remembered, was written when truth could not be pleaded to an indictment) "cannot in true policy be suffered to interrupt the tranquillity of any well ordered society." The case in *Carthew* (19), *The King* v. *Paine*, a strange and unsatisfactory case, and very loosely reported, Lord Kenyon explains, as he does also *The King* v. *Critchley* (7), by stating that in both cases an intention to subvert and slander the government of the country was charged in the indictment, and supports both cases distinctly on this ground. It may be doubted, if the cases are looked at, whether Lord Kenyon did not support the decisions (what the actual decision in the case in *Carthew* was does not appear) upon grounds which the Judges who decided them did not think of, which most certainly they did not state. In *The King* v. *Paine* (18) King William, one of the persons libelled, was alive, and Queen Mary only, the other person libelled, was dead. The case, therefore, is a very weak one on the point now before us in any view of it. The libel in *The King* v. *Critchley* (7) stated of a certain Sir Charles Nicoll, who was dead, that "he changed his principles for a red ribbon, and voted for that pernicious project, the excise." This was the whole libel; and Lord Kenyon may well have been puzzled to uphold the propriety of a criminal information in respect of it, even though the deceased Sir Charles was the father of the wife of a Secretary of State. But in the case itself, in which the libel on a deceased Lord Cowper was of the most virulent possible description, imputing to him "unmanly vices and debaucheries," Lord Kenyon, after time taken to consider, with the assent of Mr. Justice Buller, who had tried the case, arrested the judgment on the ground that it was not the subject-matter of indictment for libel to asperse the memory of the dead unless it was done with a design to break the peace. The Court of King's Bench, in the case of *The King* v. *Topham* (5), appear to assent to the principle laid down by Hawkins, that private character is to be vindicated by private action; and that an indictment or information for libel is then only to be justified when there are some incidents in it which concern the public, such as an attempt to injure the government, or an intention or tendency to break the public peace. The necessity of the person who applies for the criminal information being himself individually aspersed is laid down in very strong terms by Mr. Justice Patteson in *The Queen* v. *Mead* (20). There is no instance of an action for libel by the representative of a deceased person; it must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own foot. But this is not that case; and on this ground also we should in our discretion decline to interfere.

There remains to be considered the more general objection—namely, that this form of proceeding being in the discretion

(18) 1 Hawk. P.C. c. 28, s. 3.
(19) Carth. 405.
(20) 4 Jur. 1014.

of the Court, the case before us is not one in which that discretion, which must be legal, and exercised on legal principles, ought to sanction the filing of the information. From the very nature of the case it is useless to examine, because it is not possible to reconcile, the various decisions on the subject. However much men may honestly endeavour to limit the exercise of their discretion by definite rule, there must always be room for idiosyncrasy; and idiosyncrasy, as the word expresses, varies with the man. But there is, besides this, that of which every student of legal history must be aware, the leaning of the Courts for a certain time in a particular direction, balanced at least, if not reversed, by the leaning of the Courts for a certain time in a direction opposite. The current of legal decisions runs often to a point which is felt to be beyond the bounds of sane control; and there is danger sometimes that the retrocession of the current should become itself extreme. Many of us are old enough to have seen, or at least to have heard from those who have seen, the great diversity of which I have spoken in the matter of granting rules for criminal information. It is much too late to question the perfect legality of criminal informations. The 4 & 5 Will. & Mary, c. 18, to which so much reference was made in the argument, is conclusive to shew their legality. It was a statute passed to correct the abuse of them, and to fix the conditions on which for the future they were to be allowed: the statute either assuming that the Court had power to allow them, or conferring that power if it did not exist. But two years before the passing of this statute their legality had been denied, in the case of Mr. Prynne (6), by Sir Francis Winnington, who, in the course of a very learned argument, stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided, however, to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them.

Without going through the list of cases since the days of Lord Holt, it is certain that at times they have been granted by the Court under circumstances and for reasons which could hardly satisfy now the discretion of this Court. For example, in *The King* v. *Kinnersley* (3), a rule was made absolute against the proprietor of a paper for giving a ludicrous account of the then Lord Clanricarde's appearing with an actress in a theatre; Lord Mansfield observing, as his chief reason apparently, that "it was high time to stop this intermeddling in private families." It is not necessary to go through the cases, but the practice of granting these informations appears to have reached its greatest height in the time of Lord Tenterden. In *The King* v. *Epps* (21), there was a rule granted against a man for saying that the clergy in general, and the applicant in particular, were harsh and rigorous in exacting their tithes. The excitement on the subject of tithes was actually given by Lord Tenterden as a reason for making the rule absolute. In *The King* v. *Rintoul* (22), the whole libel was this: "The amount of public money received by the Somersets since the late Duke of Beaufort came of age far exceeds the value of the estates which he bequeathed to the present duke." "Whatever may be the opinion of others," said Lord Tenterden, "it is our opinion that this is a libel." And apparently upon no other ground the rule was made absolute. In *The King* v. *Smith* (23), there had been a riot at Oxmoor, followed by conviction of the rioters. The defendants, after the trial and conviction, published an advertisement soliciting subscriptions for the prisoners, and asking (*inter alia*) whether a large number of acres (under an inclosure), including thirty-one in lieu of tithes, had been given to Sir Alexander Croke, and whether Oxmoor Common before had not been tithe-free? Sir Alexander Croke denied the facts suggested, and had published a pamphlet upon the subject. The defendant swore that he believed the proceedings against him arose from his having supported a candidate for the county opposed in politics to Sir Alexander Croke. Under these circumstances, this Court actually made a rule absolute for a criminal information.

It is needless to multiply examples. These are selected almost by chance from

(21) T. T. 1831.
(22) T. T. 1831.
(23) M. T. 1831.

a number of other cases equally opposed to later practice; and in all of them Lord Tenterden was presiding Judge. Lord Tenterden was a great and upright magistrate, and needs no eulogy from me. But it is impossible for any one not to see the great change which had come over the feeling of the Court between the days of Lord Hale, Lord Holt, and Hawkins, and those of Lord Tenterden.

But the general dissatisfaction of the profession with this state of things led, in the time of Lord Denman and Lord Campbell, to a much stricter practice in this Court in the granting of these informations. I am quite aware that *The Queen* v. *Gregory* (2) and *The Queen* v. *Latimer* (24), and a few cases of this sort, occurred during this period of time; but there can be no doubt that the cases were rare, except some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public, and called for the interference of the Court, as representing the public and charged with the defence of its interests.

So it was during the greater part of the time of Sir Alexander Cockburn; though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend, been furnished with the reports of fifty cases of criminal information, running over the years from 1860 to 1880 inclusive; and out of these fifty cases four only were cases of informations granted at the suit of persons who were not in some public office or position; and during that time there were repeated declarations by various members of the Court, not indeed that as matter of law the information would not be granted at the suit of private persons, but that the Court would as a general rule leave private persons to their private remedies. For example, in *The Queen* v. *Lord Winchelsea*, in 1865, Mr. Justice Blackburn says, "This remedy had usually and properly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication." The Lord Chief Justice (Sir Alexander Cockburn) adds that "the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance."

In the case of *The Queen* v. *Headley*, in 1875, I find Mr. Justice Blackburn reported as saying, "It is not enough that it should appear that there has been a libel" (differing apparently in terms from Lord Tenterden, who seems, if rightly reported, to have thought it was enough), "it must also appear that it is a publication as to which we ought to put the prerogative process of the Court in operation against the writer. It should not be done too lightly, or otherwise our jurisdiction to grant criminal informations, though very useful, may be brought into odium."

Again, in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused; and I find Mr. Justice Mellor, with the concurrence of Mr. Justice Lush, saying this: "We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times; but this is hardly a case for its exercise. It is not like the case of a serious imputation on a magistrate, or a public officer like a town-clerk, for misconduct in his office."

Again, in 1878, in the case of an application on the part of the musical critic of the *Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mr. Justice Mellor and Baron Huddleston; the Court saying that the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was the exercise of the extraordinary jurisdiction of the Court, which, as a general rule, was reserved for cases of libel upon persons in an official or judicial position, and filling

(24) 15 Q.B. Rep. 1077; 20 Law J. Rep. Q.B. 129.

some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made.

Examples might be multiplied; but these are sufficient. Very few of these cases are to be found in the volumes of reports. They are cases of discretion, and turn generally upon facts, and have seldom been reported; and the passages which I have been reading have been furnished to me by a gentleman of the bar, who reported them for a newspaper, and who is able to vouch for the substantial correctness of his own reports. The circumstance that so few cases on this subject, out of the many which come before the Court, are to be found in the books must be my excuse, if I need one, for citing reports from a newspaper, which, however accurate and valuable they may be for their own objects, are generally reported rather with a view to the facts than to the law; and to cite which, therefore, except where there seems to be, as here, a real reason for it, would be of bad example.

I am able from my own recollection to state two cases—each of them I think important. This Court, in the time of Lord Campbell, refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, amongst others, that he had ceased to be Commander-in-Chief in India, and was at the time of his application to the Court only a private person. And a rule for a criminal information in the case of *The Queen* v. *Plimsoll*, in which I was myself counsel, was discharged after argument, for a libel in which a member of Parliament was accused of sending ships to sea overloaded, in order that they might sink and he might gain the insurances on them. The rule was discharged without costs, inasmuch as the applicant had cleared his character; but the Court left him to his ordinary remedy as shipowner against any one who libelled him in that character.

We are thus brought down to the last case upon the subject, with the authority of which we were pressed very properly. I mean *The Queen* v. *Yates* (1). I know nothing of the merits of the case; and if I did, as the litigation is still pending, it would be unfit to say a word. But a libel upon the private character of Lord Lonsdale, certainly not so aggravated as some of those to which informations have been refused, was made the subject of an application to this Court, and the rule for a criminal information was made absolute. It is said that it was granted almost as of course, because the applicant was a peer. The case is unreported, and I am unaware of what my learned brothers may have said; but if this was the ground, I must respectfully dissent from it. I can find nowhere any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled as a peer, for his conduct in Parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as holder of a public office, it would be undoubtedly almost of course (all other legal conditions being fulfilled) that the Court should interfere in his behalf. But that a peer in private matters is entitled to any interference at the hands of this Court which the Court would not extend in favour of the humblest subject of the Queen, I respectfully and emphatically deny. I am not aware of any authority for such a proposition (*The Queen* v. *Gregory* (2) is certainly no such authority), and I decline to make one.

It is said, on the other hand, that the point now under consideration was not taken, or at any rate not pressed upon the Court in *The Queen* v. *Yates* (1); and the probable explanation of this, which I understand on the best authority to be the fact, is this, that when several of the cases decided in the latter years of Sir Alexander Cockburn were brought before the Court, it was felt that a divisional Court must act on those later authorities, which, no doubt, formed a complete justification for the course taken by the Court.

I have said, however, that it is not possible to reconcile the cases; it is not easy, perhaps it is not possible, to lay down any rule which can guide discretion amidst the ever varying facts to which discretion has to be applied. If we go back to principle, we find it well stated by Blackstone (25): "The objects of the other species of information filed by the Master of the

(25) Vol. iv. c. 23, p. 309.

Crown Office upon the complaint or relation of a private subject, are, any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion." And, if the passage in *Starkie* be looked at in which he defends the proceeding by way of criminal information, which he calls a proceeding irreconcilable with the ordinary principles of jurisprudence on which the law of libel in England is founded, it will appear at once that that great writer would have met the application before us with a summary refusal, and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected.

It is under these circumstances that, acting under the power conferred by the Judicature Acts, I have ventured to bring together five Judges of the High Court, to establish, if possible, upon unusual authority, some principles for our guidance in future.

My colleagues, with a slight exception to be noticed hereafter, concur in this judgment; and I trust that the full discussion which this rule has received may be of some advantage, and that the grounds on which we discharge it becoming generally known, the practice of the Court may be brought back to that greater and more wholesome strictness which prevailed for at least a generation and a half; and that criminal informations may hereafter be granted only in cases which come fairly within the language of Sir William Blackstone, already quoted, which I will not repeat, and which I certainly cannot improve.

The rule must therefore be discharged; but, according to the opinion of all my learned brothers, from which I will not formally dissent, it will be discharged without costs.

My brother Denman, while concurring in the main in this judgment, has written a few words which he desires me to read.

DENMAN, J.—I agree with the Lord Chief Justice that the rule ought to be discharged on the two first grounds upon which he rests his judgment. But I desire to add that I cannot accept the passage from Blackstone (25), upon which he comments, as being quite an exhaustive description of the cases in which the Court ought to interfere. For example, if a newspaper or an individual were to shew by repeated attacks, and by wide circulation of those attacks, upon a private individual, whether a British subject or a foreigner, whether resident in England or abroad, a persistent determination to persecute, as at present advised I should think it would be the duty of the Court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute.

Rule discharged.

Solicitors—Benbow, Saltwell & Tryon, for plaintiff; Lewis & Lewis, for defendant.

1884. May 19. SHAW *v.* THE PORT PHILLIP COLONIAL GOLD-MINING COMPANY (LIMITED).

Company—Liability of Company on Forged Certificate of Registry of Shares—Fraud of Secretary in ordinary course of his duties—Estoppel—Principal and Agent—Scope of Employment.

G. having, through plaintiff as his broker, purchased 200 *shares in the defendant company, had a transfer and apparently regularly issued certificates sent to him in ordinary course. The transfer and certificates were lodged at the company's office with a request for registration, and what purported to be a certificate that G. was the registered proprietor of* 200 *shares was issued to him, signed by one director and the secretary, and bearing the seal of the company. The form of this certificate was in accordance with the company's deed and resolutions, but, in fact, the name of the director was forged by the secretary.*

Subsequently G. deposited the certificate, as security for advances, with the plaintiff, who gave the company notice of such de-

posit, neither G. nor the plaintiff having any knowledge or ground for suspicion that the certificate was not genuine.

On Case stated raising the question whether the plaintiff had a good title to the shares as against the company,—

Held, *that he had: the company were liable for the fraud of their agent perpetrated in the ordinary course of his employment, and they had here placed the secretary in a position to warrant the genuineness of the signature and the seal.*

This was a Special Case stated for the opinion of the Court as follows :—

1. The defendants, herein referred to as the company, are a limited company registered under the Joint Stock Companies Acts, 1862 and 1867, with a capital divided into shares of 2*l.* each.

2. On the 1st of December, 1880, Thomas Gledhill, through the plaintiff as his broker, contracted on the market for the purchase of 200 of the company's shares, on which 1*l.* per share had been paid up. In performance of this contract the selling brokers, in the usual course, handed to the plaintiff or his agent as buying broker a transfer of forty shares, 1*l.* paid up, signed by a Mr. A. Schofield, accompanied by the certificates of the shares, and a transfer of 160 shares, 1*l.* paid up, signed by a Mr. J. W. Purchase, the company's then secretary, also accompanied by what purported and in all respects appeared to be regularly issued certificates of those shares. The said forty shares were numbered in the said certificates thereof 15,426 to 15,440, and 21,233 to 21,257. The numbers of the said 160 shares, as stated in the certificates referring to them, were 5,926 to 6,085.

3. In January, 1881, the said Thomas Gledhill, through the plaintiff as his broker, deposited the aforesaid transfers and certificates at the company's office in London with the said Mr. Purchase, the company's then secretary, and requested that the company should register him as the proprietor of the said 200 shares, and issue him a certificate for the said shares in the usual way.

4. On or about the 16th of March, 1881, a certificate, or what purported to be a certificate, of the said shares and of the registration thereof was forwarded to the plaintiff, as the broker and agent of the said Thomas Gledhill, by the company's secretary. The following is a copy of the said certificate :—

"The Port Phillip and Colonial Gold-mining Company (Limited), incorporated by Royal Charter and Companies Acts, 1862 and 1867. Fr.

"No. 2,436. 9,701 and 2.

"This is to certify that Thomas Gledhill, Esquire, of Golcar, near Huddersfield, is the registered proprietor of two hundred shares at 2*l.* each (of which 1*l.* per share has been paid) in the above-named company, numbered 15,426 to 15,440, 21,233 to 21,257, 5,926 to 6,085.

"J. R. MacDonnell, Director.

"J. W. Purchase, Secretary.

"Dated London, this 14th day of February, 1881."

5. The said certificate was in the usual and authorised form in all respects. It was part of the regular and authorised duty of the said Mr. Purchase, as the company's secretary, to receive and examine transfers and certificates of shares, to have transfers registered, to secure the preparation, execution and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them.

6. By the deed of settlement of the said company, dated the 18th of February, 1852, it is provided (clause 38), amongst other things, "that the secretary shall also keep in safe custody at the chief offices of the company the aforesaid registers, receipt books, books of account and the common seal of the company, permitting such inspection as is hereafter provided of such of the same as are hereinafter mentioned, and affixing the seal of the company or allowing its use to such documents and on such occasions only as he is authorised and required to affix it or allow it to be used by the board of directors by resolution duly passed."

7. By a resolution of the board of directors of the said company, duly passed

on the 23rd of May, 1865, the following (amongst other) resolutions were passed:—

"The board took into consideration the question of the custody of the company's seal and the issue of the certificates of shares, when it was ordered that two keys be provided for the custody of the company's seal in addition to the one now held by the secretary; the said keys to be kept, one by the chairman, the other by the deputy-chairman, and that the seal be used only in the presence of either the chairman or deputy-chairman.

"Ordered that the certificates of shares be signed in future by one director, the secretary, and the accountant.

"J. D. Powles."

At the time of issuing the certificate of the 14th of February, 1881, the said J. W. Purchase was both secretary and accountant.

8. The company, by one cheque, dated the 1st day of March, 1881, paid a dividend to the said Thomas Gledhill upon the said 200 shares, and the cheque for the said dividend was signed by the secretary and two directors of the company.

9. In March, 1881, the said Thomas Gledhill deposited the said certificate with the plaintiff, who then, and for a considerable time afterwards, acted as his stockbroker, by way of cover or security for all moneys which then were and which might from time to time thereafter become due from him to the plaintiff for advances in the course of business.

10. On the 15th of December, 1882, the plaintiff gave the company notice that the said certificate of the said 200 shares had been so deposited with him as security. On the 16th of the same month the company informed the plaintiff that there was no such number of shares standing in Thomas Gledhill's name in their books. The signature "J. R. Macdonnell," appended to the said certificate, was forged, and the seal of the company was affixed thereto without the knowledge or authority of the said J. R. MacDonnell or any other director. It may have been affixed in the presence of the said J. R. MacDonnell or some other director, but was not so affixed with the knowledge or authority of the said J. R. MacDonnell or any other director.

11. One of the company's directors, in fact, bore the name J. R. Macdonnell; and neither the plaintiff nor the said Thomas Gledhill had, up to the time of the communications and statements referred to in the preceding paragraph, any knowledge or suspicion or ground for suspecting that the said certificate was not a genuine and regularly issued document and that the matters stated therein were not in all respects true.

12. Between the date of the aforesaid deposit of the said certificate and the said 16th of December the plaintiff had, in the course of business, made advances to Thomas Gledhill on the security of the said certificate to an amount considerably exceeding 50*l.* over and above what the latter owed him at the first-mentioned date. The said advances and debt were, on the said 16th of December, and still are, wholly unpaid, and the affairs of the said Thomas Gledhill are in liquidation under the Bankruptcy Act, 1869.

13. Subsequently, with the view of perfecting the aforesaid mortgage by deposit of the said 200 shares, the said Thomas Gledhill being called upon by the plaintiff to do so, executed what in form was a legal transfer of the said shares (and which would operate as such if and so far as he was the legal owner of the said shares) to the plaintiff. The said transfer bore date the 17th of March, 1883.

14. About the middle of March, 1883, the plaintiff left the aforesaid transfer of 200 shares by Thomas Gledhill to himself with Mr. Matthias, the present secretary, at the office of the company, with a request that the said shares should be registered in his name pursuant to such transfer. The company, however, declined to register the said transfer or to recognise the plaintiff's title to any of the said shares except the aforesaid forty. As to the latter the company are willing to recognise the plaintiff's title thereto. But should any question arise as to costs or otherwise in relation to the forty shares, it is agreed that the correspondence between the parties may be referred to, although not set out here, and the Court may deal with the matter, including the possession of the said certificate of the 14th of February, 1881, as it thinks proper.

15. The value of the said shares from December, 1882, to April, 1883, inclusive,

was 2*s.* 6*d.* per share, giving a total value of 20*l.* for the 160 shares.

16. It is agreed that the pleadings in the action shall form part of this case. The question for the opinion of the Court is whether the plaintiff in and from the month of March, 1881, had a good title as against the company to the said 160 shares. If the Court shall be of opinion in the affirmative, then judgment shall be entered in the action for the plaintiff for 20*l.* damages and costs. If the Court shall be of contrary opinion, judgment shall be entered for the defendants with costs, but without prejudice to the provisions of paragraph 14.

R. O. B. Lane, for the plaintiff.—The defendants are estopped by the certificate issued in due form from saying that the plaintiff is not owner of the shares. The certificate was given intending that it should be acted upon by Gledhill, and used as evidence of his being registered proprietor—*The Bahia and San Francisco Railway Company* (1). Purchase, the secretary, was in a position to make the representation that the certificate was genuine; his employers are therefore liable —*Barwick* v. *The English Joint Stock Bank* (2) and *Swift* v. *Winterbotham* (3)— the last case, though reversed on another point, is still an authority on this (4)— and *Swire* v. *Francis* (5).

J. F. Moulton, for the defendants.—The great distinction is that here a forgery was committed. This fraud could not have been effected without a forgery, and what was done was an independent crime by the secretary, wholly outside the scope of his employment. His criminal act could not therefore bind the defendants, and the plaintiff took the certificate at his risk.

STEPHEN, J.—The question in this case is whether the plaintiff in and from March 1881, had a good title as against the company to 160 shares. The whole matter turns on the effect of this certificate issued on the 16th of March, 1881, which is expressed to be to certify that Thomas Gledhill is the registered proprietor of 200 shares in the company. This certificate is signed "J. R. MacDonnell, director; J. W. Purchase, secretary," and is sealed with the seal of the company. On the strength of this certificate, a formal transfer of shares was made to the plaintiff by Gledhill, and afterwards, when the plaintiff required registration of such shares to be made, the question whether he had a good title to them was raised by the company. The facts in relation to the matter are that Purchase, the secretary, did sign the certificate, and did affix the genuine seal of the company, but that he forged the name of MacDonnell, a director, and then issued the document in the form already mentioned.

Now I think that it is clearly established that if the name of MacDonnell had not been on the document at all, and it had been issued merely improperly by Purchase, the secretary, it would nevertheless have been binding on the directors. This is on the authority of *The Bahia and San Francisco Railway Company* (1), and other cases which have been cited to us. Mr. Lane then says, very pertinently, how does that case differ from this? and the answer is, only in the circumstance that the secretary carried out his fraud by means of a forgery. If that be so, how does that practically differ from any other mode of carrying out a fraud so as to entitle the company to any advantage? It is contended by Mr. Moulton that the Court cannot give validity to a forged document, but he did not succeed in making clear to my mind how that contention is applicable to the admitted condition of things here. It seems to me that the company have here laid down certain formalities with respect to issuing these certificates, and that these have all been apparently complied with. The certificates were to be signed by a director, by the secretary, and by the accountant, and it was the secretary's duty to procure the signatures, to get the seal properly affixed, and issue the document. These regulations gave this secretary, he

(1) 37 Law J. Rep. Q.B. 176; Law Rep. 3 Q.B. 584.
(2) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.
(3) 42 Law J. Rep. Q.B. 111; Law Rep. 8 Q.B. 244.
(4) 43 Law J. Rep. Q.B. 56; Law Rep. 9 Q.B. 301.
(5) 47 Law J. Rep. P.C. 18; Law Rep. 3 App. Cas. 106.

being at that time both secretary and accountant, the opportunity of doing exactly what he did. Then the person receiving the certificate, which appears all right, knows that it comes from the secretary, the proper person to issue it. Is he to require further proof of its regular issue at his peril? I think not. I do not see how he is to find out whether the other matters have all been properly done; it is enough for him, in my opinion, that it appears to be all right; and the company cannot afterwards make him suffer for its not being so, through the fraud of their officer. I therefore think that the plaintiff should have judgment.

MATHEW, J.—I am of the same opinion. The liability of the defendant company is put on the old ground that the company is responsible for the fraud of their agent perpetrated in the ordinary course of his employment. I cannot doubt that what was done here by the secretary was within the scope of his employment. The company must have contemplated his doing what was done, except of course as to the forgery of MacDonnell's name, and he had the opportunity in the regular course of his duties of forging the name. It cannot, I think, be the duty of the person taking the certificate properly issued from the office, and apparently in order, to go and at his risk find out whether that which purports to be the signature of a director is genuine or not. The secretary is placed in a position to warrant the genuineness of the signature and of the seal, and I fail to see what difference it makes in respect of the liability of the company whether the fraud be carried out by a fraudulent representation of the genuineness of the signature or by the actual forgery of it.

The conclusion, therefore, is that the question must be answered in the affirmative, and that the plaintiff must have judgment for 20*l.* and costs.

Judgment for plaintiff.

Solicitors—Jaques, Layton & Jaques, agents for Fenton, Owen & Co., Huddersfield, for plaintiff; Maples, Teesdale & Co., for defendants.

[IN THE COURT OF APPEAL.]

1884. April 23. } JONES *v.* CURLING.*

Practice—Costs—Right of Appeal from Order as to—Good Cause for Order—Action for Recovery of Land—Rules of Court, 1883, *Order LXV. rule* 1.

In an action for the recovery of several closes of land the jury gave a verdict for the plaintiff for about half the land claimed, and for the defendant for the remainder. The Judge before whom the action was tried ordered that the costs of both parties should be added together, divided equally, and that each party should pay half the total thus arrived at:—Held, *that an appeal could be brought from this order, for that good cause must exist before the jurisdiction to make the order could arise, and that whether facts did or did not exist which would constitute good cause could be the subject of an appeal.* Held *also, that good cause did not exist in this case, and that the order ought to be set aside.*

Appeal from an order of Lord Coleridge, C.J., at the trial. An action for the recovery of six closes of land was tried before Lord Coleridge, C.J., when a verdict was found for the plaintiff for four closes, amounting to about eighty-one acres, and for the defendant for two closes, amounting to eighty acres. The Judge ordered that the costs of both the plaintiff and the defendant should be taxed, added together, and equally divided, and that each party should pay half the sum thus arrived at (1).

The plaintiff appealed.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

(1) The order was made while the Rules of Court, 1875, were in force. Order LV. of those rules was—"Subject to all the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court: . . . provided that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

This rule was repealed in 1883, and the rule now in force is: Rules of Court, 1883, Order LXV. rule 1—"Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including

Jones v. *Curling, App.*

Sir H. Giffard, Q.C., and *Clay*, for the plaintiff, cited *Myers* v. *Defries* (2).

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Horne Payne*, for the defendant, cited *Marsden* v. *The Lancashire and Yorkshire Railway Company* (3) and *Collins* v. *Welsh* (4).

[BOWEN, L.J., referred to *Alcock* v. *Wilshaw* (5).]

BRETT, M.R.—The first question is whether we can entertain this appeal. We are, I think, bound to enquire whether the condition exists which is necessary in order to enable an order as to costs to be made, for, unless good cause exists, a Judge has in a case tried with a jury no discretion as to costs. Whether there was good cause or not is a question on which I think an appeal lies; it is a question of fact which this Court must consider. The rule was laid down in an instructive way by the late Master of the Rolls in *Cooper* v. *Whittingham* (6), where he said, "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive and vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled, and is as I have stated it."

This definition is very instructive, and it seems to me that in order to give the right to take away costs there must exist something which, regard being had to the facts and the findings, would render it more just to make a particular order than to leave the costs to the operation of the rule.

Here the plaintiff has not been careless or negligent, and although it is said that he had no case as to part of the land, still it is also said that the case was so doubtful that neither party could know his position with certainty. If the costs were taxed on the footing that the whole case contained but one issue, injustice would, I think, follow; but the costs ought not so to be taxed. Even before the Judicature Acts, the practice was that where in ejectment claims were made for different parcels under separate demises, the case was treated as if there were separate issues, and the costs were taxed accordingly. Then *Alcock* v. *Wilshaw* (5) shews that where a plaintiff succeeds as to certain definite closes, and the defendant succeeds as to others, then, even though there was but one demise, the verdict was entered distributively, and the case was treated as if there were several separate issues.

Since the Judicature Acts, the action for the recovery of land must be treated like other actions, and if the claim is for several closes, then the costs ought to be taxed according to the result of the several claims, as though there were several separate issues.

Here the verdict is in part for the plaintiff and in part for the defendant, so that the plaintiff will get the general costs of the action and the costs of such witnesses as were necessary to prove his claim in respect to the closes as to which he succeeded, while the defendant will get the costs of such witnesses as were necessary for his defence in respect of the closes as to which he succeeded. If the expenses of the defendant were increased by the plaintiff claiming more than he ought, those costs should be allowed to the defendant. That part of the brief which contained the evidence necessary for the establishment of his case should be allowed

the administration of estates and trusts, shall be in the discretion of the Court or Judge: . . . provided also, that where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order."

(2) 49 Law J. Rep. Exch. 266; Law Rep. 25 Ex. D. 183.

(3) 50 Law J. Rep. Exch. 318; Law Rep. 7 Q.B. D. 641.

(4) 49 Law J. Rep. C.P. 260; Law Rep. 5 C.P. D. 27.

(5) 2 E. & E. 633; 29 Law J. Rep. Q.B. 143.

(6) 49 Law J. Rep. Chanc. 752, at p. 754; Law Rep. 15 Ch. D. 501.

to the plaintiff, and similarly that part of the brief for the defendant which contained the evidence relating to his successful defence should be allowed to him.

This appeal must be allowed, the order made must be set aside, and the costs must follow the event, as we think that there was no good cause for the order, and that therefore the jurisdiction of the Lord Chief Justice did not arise.

BOWEN, L.J.—I think this appeal must be allowed and that the Lord Chief Justice had not the power to make this order.

When a case is tried with a jury, the costs are removed from the discretion of the Judge, unless there is good cause for interfering with the rule as to costs following the event. If good cause exists, then the Judge has a discretion, and it seems to me that on the true construction of the rule an appeal lies as to whether facts exist or not on the existence of which the jurisdiction depends.

I think that definitions as to rules by which discretion is conferred cannot lay down hard and fast lines, but I think the Master of the Rolls has explained the rule without limiting it.

To justify an order dealing with costs so as to prevent them in the case of a trial with a jury from following the event, I think there should be a state of facts which ought to lead the Judge to hold that the ordinary rule will not work justice, and then, if he can reasonably think that the conduct of the parties and the facts of the case call for an exceptional order, he should make such an order. I think that the Lord Chief Justice has taken an incorrect view as to the practice respecting taxation. Before the Judicature Acts, if there were several demises, the verdict in an action of ejectment was distributive, and this was so where there was only one demise but several closes — *Alcock* v. *Wilshaw* (5).

Since the Judicature Acts there has been a change, for now, under the Rules of Court, the old action of ejectment has ceased to exist. The action is now for the recovery of land; it resembles other actions, and, by leave, other claims may be joined with it. It is true that by Order XXI. rule 21 the defendant may state that he is in possession of the land, and thus put the plaintiff to proof of his case; but there are pleadings and issues, and I see no reason why this action should be treated in a different way from any other action.

FRY, L.J.—The first point is whether the question as to good cause is the subject of appeal. I think it is. The rules direct that costs are to be in the discretion of the Court; but an exception is made as to cases tried by a jury, and another exception on that exception is that a different order may be made where good cause is shewn.

In this case the plaintiff gained his cause in part and lost it in part, and it is said this constitutes good cause for an order as to costs; but in this case the verdict is distributive, so that the costs will follow the issues, and the plaintiff will not get all the costs, so that justice will be done without any order such as that which has been made, and which I agree ought to be set aside.

Appeal allowed.

Solicitors—G. J. & P. Vanderpump, agents for W. P. Price, Brecon, for plaintiff; Gregory, Rowcliffes & Co., agents for Harrison, Welshpool, for defendant.

1884. March 24. } HEAP *v.* THE BURNLEY UNION RURAL SANITARY AUTHORITY.

Public Health—Keeping Animals so as to be injurious to Health — By-law — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 44 *and* 276.

[For the report of the above case, see 53 Law J. Rep. M.C. 76.]

[IN THE COURT OF APPEAL.]

1884. May 1. } MACDONALD *v.* THE TACQUAH GOLD MINE COMPANY.*

Practice — Attachment of Debts — Debt due to Judgment Debtor and another jointly not attachable.

A debt due from a garnishee to the judgment debtor and another jointly cannot be attached by a judgment creditor to satisfy a judgment obtained against the judgment debtor alone.

Appeal by the defendants from a judgment of Baggallay, L.J., at the trial.

The plaintiff, who was the execution creditor of one Fitzgerald, sought to attach a debt alleged to be due from the defendant company under the following circumstances :—

Fitzgerald and one Horton, since deceased, were the lessees of the Tacquah Gold Mines on the Gold Coast, under a lease which they had obtained from a chief and his headsman. The mines were subsequently sold for 10,000*l.* to the defendant company, the mines being mortgaged by a deed of the 20th of February, 1880, by the defendant company to the vendors to secure payment of 7,500*l.*, the balance of the purchase-money. The deed contained a covenant on behalf of the company to pay the sum so secured to the vendors jointly, it being also declared that the money belonged to them upon a joint account in equity as well as at law.

The plaintiff subsequently obtained an issue to try the question "whether, on the 25th of April, 1883, there was a sum due or which would accrue due to Fitzgerald in respect of his share of the balance of the purchase-money remaining unpaid by the defendant company under the deed of the 20th of February, 1882," and also in respect of another sum.

At the trial before Baggallay, L.J., at Maidstone, the defendants admitted their liability in respect of a sum of 67*l.* odd which was not due under the deed, and the jury were discharged, the question then being argued whether there was a debt due under the deed from the company to Fitzgerald such as could be attached. His Lordship ultimately held that there was a debt which could be attached, and also that a sum of 1,688*l.* 10*s.* 10*d.* was due to Fitzgerald.

The company appealed (1).

Finlay, Q.C., and *Percy Gye*, for the defendants.—The question is whether a debt which is admittedly due to Fitzgerald and Horton can be attached by a judgment creditor of Fitzgerald. The covenant to secure the payment of the balance of the purchase-money is a covenant to pay it jointly to Fitzgerald and another person. The test is whether an action upon the covenant could be maintained by the judgment debtor alone; if such an action were brought the plaintiff would be nonsuited. The decision of Baggallay, L.J., followed that of *Nash* v. *Pease* (2), which, however, is in effect overruled by *Webb* v. *Stenton* (3), where it was held that the debt, to be attachable, must be a debt payable *in præsenti* or *debitum in præsenti solvendum in futuro*. There must be a *debt* owing or accruing from the garnishee to the judgment debtor; here there is no debt.

Petrie v. *Bury* (4), *Scott* v. *Godwin* (5) and Order XLV. rules 1, 2, 3 and 4 were referred to.

Clarke, Q.C. (with him *Morton Smith*), for the plaintiff.—The defendant company are liable to pay to the judgment debtor and Horton the sum due upon the covenant; so that the judgment debtor is entitled to his share of that sum. The object of the issue was to ascertain the amount due to the judgment debtor; that amount, when ascertained, becomes a debt which can be attached by the plaintiff.

Luke v. *The South Kensington Hotel Company* (6) was referred to.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

(1) The question in the present case arose under Order XLV. rule 2 of the Rules of the Supreme Court, 1875; but the present Order XLV. rule 1 is the same as the annulled rule, with the exception that the proceedings for attachment of debts are now extended to orders as well as to judgments.

(2) 47 Law J. Rep. Q.B. 766.

(3) 52 Law J. Rep. Q.B. 584; Law Rep. 11 Q.B. D. 516.

(4) 3 B. & C. 353.

(5) 1 Bos. & P. 67.

(6) 48 Law J. Rep. Chanc. 361; Law Rep. 11 Ch. D. 121.

BRETT, M.R.—The first question to be determined is the meaning of certain words of the issue—namely, "whether there was a sum due or which would accrue due" in respect of Fitzgerald's share in the balance of the purchase-money. The only sum which could be material in these proceedings is a sum which is a debt; and the word "sum," in my opinion, means a debt, and, even if it could not properly be read as meaning a debt, it ought, in my opinion, to have been treated as such at the trial of the issue. If anything would be a debt here, it would be in respect of Fitzgerald's share in the unpaid balance, and the words "a sum" are only descriptive of the mode and manner in which the question was to be raised whether there was a debt or not. The case of *Webb* v. *Stenton* (3) states the law to be applied to the facts of this case. The question is whether there is a debt owing or accruing from the garnishee to the judgment debtor. In *Webb* v. *Stenton* (3) the Court held that there must be a debt existing at the time when the order for the attachment is sought for—that is, there must be a debt payable *in præsenti* or *debitum in præsenti solvendum in futuro*. The words "debts owing or accruing" do not include something accruing hereafter, and which may hereafter become a debt—that is, a legal debt. I also agree with what was said by Lord Justice Fry in *Webb* v. *Stenton* (3) as to the word "debt" in the rule including, not only a legal, but also an equitable debt. In this case the defendant company were indebted in a liquidated sum under the covenant to Fitzgerald and Horton jointly; so that neither of them could have sued the company alone, because it was not a debt due to either of them alone. There could be no debt due from Horton to Fitzgerald, unless the money had been paid by the company to Horton and he had refused to pay to Fitzgerald the sum to which he was entitled. There was therefore no legal debt due to Fitzgerald alone. For the same reasons there was no sum due to Fitzgerald in equity; for a suit could not have been maintained by him alone in equity without Horton also being made a party. The present case is not therefore brought within the rule as interpreted by the Court in *Webb* v. *Stenton* (3).

BOWEN, L.J.—I am of the same opinion. I agree that the issue substantially raises the question whether any debt was owing or accruing due from the company to Fitzgerald. Under the rules there must be a debt, and, if there is any indebtedness, the Court may order the debt whether owing or accruing to be attached. The word "debt" includes both legal and equitable debts. Can it be said that a sum of money due under a covenant to two persons jointly is a sum due to one of them? Before the Judicature Acts such a proposition would have been unarguable; and there is no difference now, for no right is given to a party to insist upon payment of money which is not due. It is clear that now, as formerly, a debt which can only be recovered against persons jointly is not a debt due to one of them, and cannot be attached by the judgment creditor of one of them.

FRY, L.J.—I think that the form of the issue raises the question whether some person is indebted to the judgment debtor. The rule which affects this question requires the judgment creditor to shew that the judgment has not been satisfied and that some other person is indebted to the judgment debtor. It cannot be said that a person is indebted to the judgment debtor if he is indebted to him jointly with some other person. If the language of the rule does admit of that construction, the result would be that debts due from A to B and C could be attached to answer the debts of B alone. But that would lead to serious inconvenience. I also agree with what has been said as to the rights of parties not having been altered by the Judicature Acts.

BRETT, M.R.—All that we will say with regard to *Nash* v. *Pease* (2) is that, even if that decision is right, it is not in point in this case.

Solicitors—W. M. Tilson, for plaintiff; Newman, Hilliard & Stretton, for defendants.

1883. Dec. 17, 19, 20. 1884. Feb. 9.

THE ATTORNEY-GENERAL *v.* JOHN BIRKBECK, JOSEPH BIRKBECK, GEORGE STANSFELD, WILLIAM ALCOCK, HENRY ALCOCK, AND THE CRAVEN BANK (LIMITED) (1).

Banker—Right to issue Bank Notes—Banker lawfully issuing Notes on May 6, 1844*—Transfer of Business—Reservation as to Right of Issue—Bank Charter Act*, 1844 (7 *&* 8 *Vict. c.* 32), *ss.* 11, 12 *and* 28.

A firm of bankers lawfully issuing notes on the 6th of May, 1844, *and accordingly permitted by* 7 *&* 8 *Vict. c.* 32 (*the Bank Charter Act*, 1844), *under certain conditions, to continue so to do, sold their business to a limited company, "excepting their right to issue notes, but including agreed benefit of the issue"; and it was agreed that they might continue to issue their notes, but through the company's officers only, that the company should allow them interest on the circulation at two per cent. less expenses, that to continue the issue new partners might be admitted, but not without the company's consent, that if their right of issue were taken away any compensation given them should go to the company unless it should get an equal right of issue, and that if it should acquire a right of issue their right of issue was to cease. The firm ceased to carry on business except under that agreement:*—Held, *that their notes could no longer be lawfully issued, whether under the agreement or otherwise, as the agreement amounted to a transfer of their right of issuing notes, as well as of the rest of their business, and they had therefore, within the meaning of sections* 12 *and* 28 *of the Act, ceased to "carry on the business of a banker, whether by the issue of notes or otherwise," and so were prohibited from thereafter issuing notes.*

This was a revenue information against the members of a banking firm lawfully issuing on the 6th of May, 1844, their own bank-notes, and accordingly permitted by the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), under restrictions, to continue so to do (2), and against a limited banking company, to whom they, in 1880, sold their business, subject to the reservation stated in the judgment as to their right to issue notes, filed in respect of the issuing

(1) An officer of the defendant company was joined as a defendant for the purpose of discovery only.

(2) 7 & 8 Vict. c. 32, after separating the Issue Department of the Bank of England from the Banking Department, and making regulations for the former, limiting the amount of securities against which it may issue Bank of England notes to 14,000,000*l.*, save that if any banker issuing notes ceases to issue them the amount may be increased, the profit of which increase is by section 9 to go to the public, enacts:—

Section 10: " . . . no person other than a banker who on 6 May, 1844, was lawfully issuing his own bank-notes, shall make or issue bank-notes in any part of the United Kingdom."

Section 11: " . . . it shall not be lawful for any banker to draw, accept, make, or issue in England . . . any bill . . . or . . . note . . . payable to bearer on demand, or to . . . take up . . . money on" his "bills or notes" so "payable, . . . save that it shall be lawful for any banker who was on 6 May, 1844, carrying on the business of a banker in England, . . . and was then lawfully issuing . . . his own bank-notes, under . . . a licence, . . . to continue to issue such notes to the extent, and under the conditions hereinafter mentioned . . . ; and the right of any company or partnership to continue to issue such notes shall not be . . . affected by any change which may . . . take place in" its "personal composition . . . either by . . . transfer of any . . . share . . . or . . . admission of any new . . . or . . . retirement of any present . . . member . . . ; provided always that it shall not be lawful for any . . . partnership now consisting of only six or less than six persons to issue bank-notes . . . after the number of partners . . . shall exceed six in the whole . . ." [As to the number six see 25 & 26 Vict. c. 89. s. 205, sched. 3, part 2, putting banks of ten persons on the same footing generally as banks of six persons.]

Section 12: " . . . if any banker in any part of the United Kingdom who . . . shall be entitled to issue bank-notes shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank-notes . . . , it shall not be lawful for" him "thereafter to issue any such notes."

Sections 13 and 17 limit the amount of notes which a banker may have in circulation to his average circulation at the passing of the Act, and impose a penalty for excess, besides requiring the claim to issue notes to be duly notified on the passing of the Act."

Section 28: " . . the term 'banker' shall extend . . . to all . . . persons . . . carrying on the business of banking, whether by the issue of bank-notes or otherwise, except . . . the Bank of England . . . ."

of notes subsequently to such sale, and praying—1, 2, 3, declarations that the defendants had issued bank-notes in contravention of the revenue laws, and had under the Stamp Act, 1870, s. 47 (3), forfeited 50*l.* in respect of every note so issued; that the firm were not entitled to a licence under 9 Geo. 4. c. 23 (4); that bank-notes within the meaning of 7 & 8 Vict. c. 32. s. 28, as amended by 17 & 18 Vict. c. 83. s. 11, could not lawfully be issued (whether under the agreement of 1880 or otherwise) by or on behalf of the defendants or any of them; 4, an injunction against the issue of bank-notes by or on behalf of the defendants or any of them; 5, 6, 7, 8, subsidiary and further or other relief. The facts and arguments are stated (sufficiently for the report) in the judgment, subject to the slight additions in the foot-notes.

The Attorney-General (*Sir H. James*) and *The Solicitor-General* (*Sir F. Herschell*) (*R. S. Wright* and *Danckwerts* with them), for the Crown.

R. E. Webster, Q.C., and *Pollard* (*H. E. Stansfeld* with them), for the defendants.

The judgment of the Court (5) was delivered (on Feb. 9, 1884) by

STEPHEN, J. (6).—This was an information for penalties under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 47 (3), filed against the defendants under the following circumstances:—

The firm of Birkbeck & Co., otherwise known as the Craven Bank, carried on the business of bankers in Yorkshire for a great many years previous to 1880, and from the year 1791 they issued notes which subsequently to 1844 were for 5*l.* only (7). In 1880 the defendants who then represented the firm transferred their banking business to a limited liability company called The Craven Bank, Limited. This was effected by a written agreement of which the following provisions appear to us material to the decision of the present case:—

By article 1 the vendors agreed to sell, and the company to purchase and take over, "the whole of the said business of the Craven Bank Company and of Birkbeck, Robinson & Co. as a going concern, and the goodwill thereof, except and always reserving to the vendors their right to issue their own bank-notes, but including in the said sale and purchase such benefit of the said issue as is hereby agreed to be given to the company."

By article 7 it was agreed as follows:—"If circumstances permit, the vendors shall for a period not exceeding five years, and may for a longer period continue to issue their own notes in the same form as heretofore, but through the officers of the company only; and the vendors for that purpose shall, from time to time, nominate such clerks or officers of the company as they the vendors shall think fit, and shall make the returns required by statute through such clerks or officers. The company shall allow the vendors interest at the rate of 2*l.* per centum per annum on the amount of all notes from time to time in circulation. The accounts between the vendors and the company in respect of the issue shall be stated and a balance struck on the 30th day of June and the 31st day of December in every year, and the amount found due shall be thereupon paid, after deducting therefrom all the expenses of the issue. For the purposes of the issue only, the vendors may continue to use the names of their said firms, or such name as has been

(3) 33 & 34 Vict. c. 97. s. 47. sub-s. 1: "If any banker, not being duly licensed or otherwise authorised to issue unstamped bank-notes, issues or causes or permits to be issued any bank-note not being duly stamped, he shall forfeit the sum of 50*l.*" Upon the argument, it was stated that the Crown did not seek to recover more penalties than one, the information being filed to determine the question whether bank-notes could be issued by the defendants, who, if entitled to issue bank-notes, were entitled to issue them unstamped upon complying with certain conditions as to payment of licence duty, &c., which they had duly offered to comply with.

(4) *i.e.*, a licence such as is mentioned in the last preceding note.

(5) Lord Coleridge, C.J., and Stephen, J.

(6) The judgment was read by Lord Coleridge, C.J.

(7) It may here be added that the information stated, and the answers of the defendants said the statement was true,—"The members of the partnership have not since July 19, 1844," the date of the passing of 7 & 8 Vict. c. 32, "exceeded six in number."

hitherto accustomed; but the rights of the vendors shall not be assigned, but shall pass only to the surviving or continuing partners or partner: Provided always that a new partner or new partners shall from time to time be admitted on like terms for the purpose of continuing the issue of notes, but not without the consent of the company."

Article 10 provided as follows:—"The vendors shall not, nor shall any of them, at any time hereafter as long as the company carry on business, unless with the consent of the company, carry on in the county of York or the county of Lancaster the business of banking, except so far as relates to the issue of their notes under this agreement."

Finally, article 11 is as follows:—"If at any time hereafter the vendors shall be restrained from issuing their notes, and no equal right of issue shall at the same time be given or allowed to the company, any composition or compensation which shall be made to the vendors, or their successors in exercising their right to issue, in respect of such right, shall be paid over by them to the company; but, if at the time of such restraint an equal right of issue shall be given or allowed to the company, then any such composition or compensation as aforesaid shall belong to the vendors or their successors absolutely. If at any time hereafter the company shall acquire the right to issue their own notes, the right hereby reserved to the vendors of issuing their own notes shall thereupon cease and be determined."

Under this agreement the company took over the business as from the 1st of July, 1880, and have carried on the business since that time.

The facts with regard to the issue of notes of the firm were as follows:—When the business was taken over, a considerable number of notes, about 60,000*l.* worth, were in circulation, and the vendors received from the company 60,000*l.* less than they would otherwise have been entitled to. In other words, 60,000*l.* in circulation were treated as a liability of the firm which the company were to meet. On the other hand, the notes in hand at the various branches of the firm were treated as so much cash lent by the firm to the company. As the outstanding notes were presented for payment they were cashed by the company; and on the other hand, they were issued by the company to persons who had to receive cash from them and who chose to take it in that form. Daily returns were made to the head office of the company, shewing how many of the firm's notes they had in stock at the closing of the bank, and this shewed how many were in circulation. Twice a year the firm were paid two per cent. interest on the amount in circulation thus ascertained. The notes in stock were regarded as being received by the company for the firm, and re-lent by the firm to the company as soon as they were received by the company for the firm.

Several affidavits were filed, and a good deal of argument was put forward as to the manner in which the books were kept, and the inferences to be drawn from them. It was sworn by certain accountants from different Government offices that the books shewed that the company, and not the firm, carried on the business of a bank of issue for their own profit, and that no separate accounts were kept of the issue business and the other business of the bank. It was sworn, in substance, on behalf of the defendants that the books, when properly examined, shewed the course of business which has just been described; and it was argued that it followed that the firm still carried on their business of a bank of issue through the company, who acted solely as their agents. The controversy as to the books appears to us immaterial. The substance of the transaction appears on the agreement and on statements of fact admitted to be correct. The way in which it was recorded in the books really throws no light upon it. It is consistent with either of the views suggested to us as to the transaction itself.

The legality of the arrangement made, and of the course pursued in virtue of it, depends mainly upon the construction of 7 & 8 Vict. c. 32. ss. 11 and 12 (2)—the Bank Charter Act of 1844. Section 11 prohibits the issue of notes by bankers, with the following exceptions:—"Any banker who was on the 6th of May, 1844, carrying on the business of a banker in England

or Wales, and was then lawfully issuing in England or Wales his own bank-notes under the authority of a licence to that effect," may "continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise." It is admitted that the defendants (other than the Craven Bank, Limited) are within this exception. The question is whether they are within a limitation imposed upon it by section 12. This section provides that, "if any banker who after the passing of this Act shall be entitled to issue bank-notes shall . . . . cease to carry on the business of a banker, or shall discontinue the issue of bank-notes, ... it shall not be lawful for such banker at any time thereafter to issue any such notes." By the interpretation clause, section 28, it is enacted that "the term 'banker' shall extend and apply to all corporations, societies, partnerships and persons, and every individual person carrying on the business of bankers, whether by the issue of bank-notes or otherwise, except only the governor and company of the Bank of England."

Upon these enactments it was contended that, in the circumstances already detailed, all the defendants had issued bank-notes in contravention of section 11; that the Craven Bank, Limited, having been established in 1880, were not within the exception, and that the Birkbecks were not protected by the exception in section 11, because they had ceased to carry on the business of bankers within the meaning of section 12.

To this it was replied that the Birkbecks had never ceased to carry on the business of bankers, that under the agreement with the company they continued to carry on the business of a bank of issue, and that the company issued their notes as their agents, and not otherwise.

We are of opinion that the contention of the Crown is correct, and for the following reasons:—We think that the effect of the agreement between the company and the firm of Birkbeck & Co., substantially and really, was to transfer the business of the firm to the company, including in the transfer the right, which before the transfer the firm no doubt possessed, of issuing bank-notes; and that the object of the provisions in the agreement which we have quoted was to evade the provisions of the Bank Charter Act, and to keep alive the power to issue notes, which, according to those provisions, would have ceased as soon as the firm was merged in the company. We do not mean to cast any imputation on the parties by this statement. There are many cases, and this may be one of them, in which legal obligations are the measure of moral obligations. The question before us is simply whether the parties have succeeded in keeping outside the prohibition of the Act. We think they have not.

The first question is, by whom are these notes issued? That they are in fact issued by the Craven Bank, Limited, is admitted. The contention on the part of the defendants is that they are issued by the Craven Bank, Limited, only as agents for Birkbecks. The word "issued" is not, so far as we know, defined in any of the Acts which relate to this subject; but it obviously is not equivalent to "pass" or "circulate"; for, if it were, every one who made use of these notes would violate the Act. Its meaning may be inferred from the language of several of the earlier Acts. Thus, in 39 & 40 Geo. 3. c. 28. s. 15, the words used are, "it shall not be lawful for any body politic or corporate" (except the Bank of England), "or for any partnership of more than six persons, to borrow, owe or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months," &c. These words, coupled with the word "issue," are repeatedly used in the later Acts—see 7 Geo. 4. c. 46. ss. 1, 3 and 4; also 3 & 4 Will. 4. c. 98. s. 3; and they occur in the section on which this case turns—7 & 8 Vict. c. 32. s. 11. The earlier part of that Act, however, which separates the issue department from the banking department of the Bank of England, throws the strongest light on the subject. Shortly it provides that there shall be kept in the issue department of the bank a specified amount of securities, coin and bullion, not to exceed, except in certain cases, the sum of fourteen million pounds. Bank of England notes are to be delivered out of the issue department into the banking department to such an amount

as, when taken with the notes then in circulation, to make up fourteen million pounds. If any banker who in 1844 was issuing his own notes ceases to issue them, the bank may issue an equivalent number in addition to the fourteen millions. These provisions, taken together, shew clearly what is meant by the "issue" of notes. The word means the delivery of the notes to persons who are willing to receive them in exchange for value in gold, in bills, or otherwise, the person who delivers them being prepared to take them up when they are presented for payment.

Who issues the notes in question in this sense of the word? It is admitted that the Craven Bank, Limited, has the custody and actual control of the notes, and that it delivers them to persons willing to receive them in exchange for bills, cheques, cash or other valuable security. It is also admitted that it does in fact cash notes presented for payment. In other words, the Craven Bank issues the notes in fact. But it is contended that it does so as the agent of the firm of Birkbeck & Co., and not otherwise; and that therefore it does not issue them within the meaning of the Act. The principal arguments in support of this contention, used before us, were as follows:—First, it was said, Birkbeck & Co., and not the Craven Bank, Limited, are liable on the notes themselves as the makers of them; therefore the Craven Bank, Limited, does not issue, but merely circulates, the notes. Whether the bank is liable on the notes themselves, we need not decide; but assuming, for the sake of the argument, that it is not, it seems to us to be a matter of no importance—first, because the Craven Bank, Limited, is, as was admitted, under a contract with Birkbeck & Co. to cash the notes on presentment; secondly, because when it gives such notes against value received it makes itself liable to the person to whom it gives them, if he presents in due course to Birkbeck & Co. and they dishonour them. Hence the Craven Bank, Limited, falls within the definition of issuing just given. It gives out the notes to the public, and it is bound to the makers of the notes, and also to the persons to whom the notes are given, to give cash for them. The prohibition of section 11 of the Bank Charter Act is not confined to the issue by a banker of his own notes. It forbids the "issue of any bill of exchange, or promissory note, or engagement for the payment of money payable to bearer on demand." The Act, no doubt, goes on to forbid any banker "to borrow, owe or take up any sum of money on the bills or notes of such banker payable to bearer on demand:" but it treats the two operations as distinct, and it appears to us that the first branch of the prohibition covers what was done in this case.

It was argued that, upon the construction of the agreement, it must be taken that the Craven Bank, Limited, issued only as agents for Birkbeck & Co.; and the points relied on were as follows:—The agreement, it was said, keeps alive the firm of Birkbeck & Co. for the purpose of issuing their own notes. It empowers them to keep their own clerks for the purpose. It does not bind the Craven Bank, Limited, to cash the notes or to keep a fund for the purpose of cashing them. The original fund for cashing the notes was provided by Birkbeck & Co. in the first instance; for they left in the hands of the Craven Bank, Limited, about 60,000*l.* to meet the notes in circulation when the business was taken over, which sum they would otherwise have received from the Craven Bank, Limited. The effect of the subsequent transactions is the same as if Birkbeck & Co. had had a separate room and separate clerks at the bank; as if those clerks had received cash for all notes issued, and paid cash for all notes presented, and had lent the balance in hand to the bank day by day, the bank paying two per cent. on the amount of notes in circulation.

It was argued, on the other hand, that there is no agency at all in the matter; that the 60,000*l.* left by Birkbeck & Co. in the hands of the Craven Bank, Limited, when the business was taken over, was simply a sum left to provide for one of the liabilities of Birkbeck & Co. taken over by the Craven Bank, Limited; and that, in all subsequent transactions, the Craven Bank, Limited, were principals, Birkbeck & Co. having nothing to do with them.

This view appears to us true. Suppose there had been but one note in circulation when the business was taken over, and

that Birkbeck & Co. had received 5*l.* less than they would otherwise have received in order to cash it. Suppose, further, that that note had been cashed, and that a few days after it had been reissued as part of the consideration for an acceptance for 100*l.*, discounted with the Craven Bank, Limited, by A B; the liability of Birkbeck & Co. in respect of which they left the 5*l.* in the hands of the Craven Bank, Limited, would have been discharged as soon as five sovereigns were paid to the holder, and the transaction would have been at an end. The discounting of A B's bill for 100*l.*, and the reissue of the note as part of the value given for it, would have been a transaction between A B and the Craven Bank, Limited, to which Birkbeck & Co. would have been strangers, though they might be involved by the issue of the note in a liability to the holders, against which, however, the Craven Bank, Limited, had agreed to protect them.

The ingenious suppositions put forward, on behalf of the defendants, as to the equivalency between what was actually done and what might have been done, appear to us to be beside the point. It is conceivably possible that the firm of Birkbeck & Co. might have continued to carry on business as a bank of issue, and might in some way have made the Craven Bank, Limited, their agents for that purpose, and this might have had much the same effect as the present arrangement; but we do not think they have succeeded in performing this delicate operation. What they would have effected by the agreement before us, if it had been lawful, would have been a transfer, in a cumbrous way, of the right of issuing bank-notes from Birkbeck & Co. to the Craven Bank, Limited, in consideration of a payment of two per cent. on the amount of notes in circulation; and this transfer the law forbids. It is impossible for us to doubt that this is the object, and would, if the agreement were lawful, be the effect of the agreement.

The agreement makes over the whole business of Birkbeck & Co. to the Craven Bank, Limited, except the right to issue notes, but including such benefit of the issue as is subsequently reserved to the Craven Bank, Limited. The firm are to issue their own notes for five years, and may issue them for a longer period, "but through the officers of the company only." They may continue to use their own firm name, but only for the purposes of the issue. New partners, to keep the firm alive, may be introduced, "but not without the consent of the company." Any compensation they may receive, if their right of issue is taken away, is to be paid to the company, unless the company gets an equal right of issue, in which case the firm may retain the compensation. If the company acquires a right to issue its own notes, the right of the firm to do so is to cease. The firm are to receive from the company two per cent. on the amount of notes from time to time in circulation. Taken together, this appears to be no more than a studiously obscure and elaborate way of saying that the firm assign to the company the right of issuing notes, in consideration of a payment of two per cent. on the amount in circulation. What has been done amounts to this:—the firm left in the company's hands funds to meet the notes in circulation at the time of the transfer, and since that time has allowed the company to issue the notes to its customers as principals in its transactions with such customers. The very words of the agreement shew that this is its true meaning. The firm reserve their right to issue notes, but sell to the company "such benefit of the said issue as is hereby reserved." If they had said, "We reserve the right, but sell you the benefit of the right," the case would have been plain; they would have made themselves at most bare trustees of the right for the benefit of the company; and, when the latter part of the agreement is examined, it is quite clear that this is what has actually been done. The firm of Birkbeck & Co. have deprived themselves of all possible benefit which could accrue to them from the exercise of their right, in consideration of two per cent. on the amount of notes in circulation. For what is the benefit of the right? It was suggested to us that its benefit was that it served as an introduction to business. People who came to the bank to change notes would, it was said, come for other purposes. We cannot accept this statement. It is perfectly plain that the benefit to a banker of the right to issue notes (and

it can be a benefit to no one else) is that it operates *pro tanto* as an increase to his capital. So long as they are in good credit, the power to issue notes to the extent of 70,000*l.* is equivalent, for many purposes, to the Craven Bank, Limited, to the possession of 70,000*l.*, which they can employ in their business; and it is for this that they agree to pay two per cent. to Birkbeck & Co. What benefit is left to Birkbeck & Co. beyond the two per cent.? Absolutely nothing, except indeed the bare possibility of being allowed, in a highly improbable contingency, to retain a compensation to which their right is, to say the least, extremely questionable. They must not issue their notes through any other bank. They must not use their firm name except for the purpose of authorising that issue. If they get any compensation for the loss of their right, the bank is to have it, except in a highly improbable contingency. If the bank gets the right to issue its own notes, they are to discontinue their issue; obviously in order to avoid all competition. The liability of the firm to the holders of the notes remains; but that is no advantage to them, but the reverse. The result is that, in consideration of the payment mentioned, the bank obtain the whole benefit of the privilege of issuing their notes, and the sole power of issuing them. This, we think, is in substance and in truth a transfer of the privilege; and the effect of the Bank Charter Act is to prohibit such a transfer, as it forbids any bankers who were not carrying on the business of a banker in 1844, and then lawfully issuing their own bank-notes, to issue notes; and, if our view is correct, the issue of these notes by the Craven Bank, Limited, falls within this principle.

This is enough to entitle the Crown to judgment. But there is another point in the case which is disposed of by the same reasoning, and which applies more particularly to the defendants other than the Craven Bank, Limited. Section 12 prohibits any banker, who, being entitled to issue bank-notes, "shall cease to carry on the business of a banker," from issuing thereafter such notes. The Crown contended that, on the making of the agreement of 1880, the defendants other than the Craven Bank, Limited, ceased to carry on the business of bankers, and became shareholders or directors of the Craven Bank, Limited (8). To this it was replied that the effect of the agreement was that they continued to carry on business as bankers of a bank of issue; and that, by the interpretation clause, the word "bankers" applied to every person "carrying on the business of banking, whether by the issue of bank-notes or otherwise." It is not impossible that this expression may mean "carrying on business as a banker, whether he issues notes or not"; and it may have been thought necessary, because in several of the earlier statutes, from the days of Queen Anne down to 3 & 4 Will. 4. c. 98, the word "bank," and the expression "exclusive privilege of banking," are used to mean a bank of issue as distinguished from a bank of deposit. But, however this may be, it appears to us that the contention of the Crown is well founded.

The effect of the agreement of 1880 appears to us, for the reasons already given, to have been to transfer the business of Birkbeck & Co. to the Craven Bank, Limited, to bind Birkbeck & Co. not to carry on the business of banking, except so far as was necessary to enable them to carry out what was in reality a transfer of their right to issue notes to the Craven Bank, Limited. After the date of that agreement, it appears that the business of a bank of issue was carried on by the Craven Bank, Limited, and not by the other defendants, though the other defendants no doubt continued to authorise the issue of their notes by the Craven Bank, Limited, and to receive payment for their consent to and participation in such issue.

For all these reasons we think there must be

Judgment for the Crown.

Solicitors—Hare & Co., agents for the Solicitor to the Treasury, for the Crown; Freshfields & Williams, for defendants.

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(8) Under the agreement they were to take half of the first issue of shares.

[IN THE COURT OF APPEAL.]

1883.
Dec. 14, 15, 17.
1884.
April 9.

SVENSDEN *v.* WALLACE.*

Ship and Shipping—General Average—Port of Refuge—Expenses of Reloading and Outward Port Charges.

When a vessel goes into a port of refuge in consequence of a particular average loss, the expenses of reloading the goods unloaded only for the purpose of repairing the injury, and the expenses incurred for pilotage and other charges in leaving port, are not the subject of general average.

So held, *per* BRETT, M.R., *and* BOWEN, L.J. (BAGGALLAY, L.J., *dissentiente*).

Judgment of LOPES, J. (52 Law J. Rep. Q.B. 396), *reversed.*

Appeal from a judgment of Lopes, J., on further consideration, in favour of the plaintiffs. The case is reported 52 Law J. Rep. Q.B. 396.

Webster, Q.C., and *Gorell Barnes* (with them *Myburgh, Q.C.*), for the defendants.

Russell, Q.C., and *Cohen, Q.C.* (with them *H. D. Warr*), for the plaintiffs.

The following authorities were cited in addition to those referred to in the judgments of the Court:—*Kidston* v. *The Empire Marine Insurance Company* (1), *Jackson* v. *The Union Marine Insurance Company* (2), *Cook* v. *Jennings* (3), *Wilson* v. *The Bank of Victoria* (4), *Powell* v. *Gudgeon* (5), *Benson* v. *Chapman* (6), *Mavro* v. *The Ocean Marine Insurance Company* (7), *Moss* v. *Smith* (8), *Worms* v. *Storey* (9), *De Cuadra* v. *Swann* (10), *Philpott* v. *Swann* (11), *Kemp* v. *Halliday* (12), *Park on Insurance* (13), *Maclachlan on Shipping* (14), *Phillips on Insurance* (15), *Arnould on Marine Insurance* (16), *Marshall on Marine Insurance* (17), *Pardessus, Cours de droit commerciale* (18), *Boulay-Paty, Notes to Emerigon* (19), *Bédarride Commentaire du Code de Commerce (Maritime)* (20), and *Abbott on Shipping* (21).

Cur. adv. vult.

The following judgments were delivered on April 9:—

BRETT, M.R.—This was an action brought by the plaintiffs, owners of a Norwegian ship, against the defendants, owners of cargo on board, to recover a general average contribution in respect of expenses incurred. The facts stated to have been proved in evidence were as follows:—The cargo was shipped at Rangoon to be carried to Liverpool. During the voyage the ship by reason of tempest sprung a dangerous leak; the captain, for the safety of ship and cargo, put into Port Louis, in the Mauritius, to repair. When in port it was necessary, in order to repair the ship, but not otherwise necessary, that the cargo should be landed, and it was landed; the cargo was warehoused; the ship was repaired; the cargo was reloaded; the ship was piloted out to sea; the ship arrived safely at Liverpool. Upon demand the defendants acceded to pay contribution in respect of the towage, pilotage, and port dues inwards, and in respect of the unloading of the cargo, and admitted their liability to pay the warehouse rent of the cargo, but refused to contribute towards the reloading of the cargo, or the pilotage or port dues outwards. The items in dis-

* *Coram* Brett, M.R.; Baggallay, L.J., and Bowen, L.J.

(1) 36 Law J. Rep. C.P. 156; Law Rep. 1 C.P. 535.
(2) 44 Law J. Rep. C.P. 27; Law Rep. 10 C.P. 125.
(3) 7 Term Rep. 381.
(4) 36 Law J. Rep. Q.B. 89; Law Rep. 2 Q.B. 203.
(5) 5 M. & S. 431.
(6) 2 H.L. Cas. 696.
(7) 43 Law J. Rep. C.P. 339; Law Rep. 9 C.P. 595.
(8) 9 Com. B. Rep. 94, 105; 19 Law J. Rep. C.P. 225.
(9) 11 Exch. Rep. 427; 25 Law J. Rep. Exch. 1.
(10) 16 Com. B. Rep. N.S. 772, 795.
(11) 11 Com. B. Rep. N.S. 270; 30 Law J. Rep. C.P. 358.
(12) 6 B. & S. 746, 757; 34 Law J. Rep. Q.B. 223; Law Rep. 1 Q.B. 520.
(13) 8th ed. vol. i. p. 291.
(14) 3rd ed. at pp. 427, 428.
(15) Sections 1288, 1312, 1320.
(16) 2nd ed. pp. 905, 906, and s. 334, at p. 920.
(17) At p. 426.
(18) At p. 301.
(19) Vol. iv. pp. 454, 457.
(20) Vol. v. at p. 58; liv. ii. art. 402; s. 1670.
(21) 5th ed. at pp. 452, 580, and 12th ed. at pp. 508, 515.

pute therefore in the action were the items charging contribution in respect of the reloading, and the pilotage and port charges outwards. The case was tried before Mr. Justice Lopes without a jury, and the learned Judge gave judgment in favour of the plaintiffs for all and each of the items in dispute, on the ground that the case was governed by the decision in *Attwood* v. *Sellar* (22), either as being directly within the decision in that case, so as to bind this Court now, or as being within the principles on which that case was decided.

It is to be remarked that in this case the original damage was caused by perils of the sea; that the first act of sacrifice was the incurring of expenses in taking the ship and cargo into port for the safety of both ship and cargo; that the unloading of the cargo was necessary in order that the ship might be repaired, but not necessary on account of any danger of damage to be suffered, or of any damage already incurred by the cargo; that the warehousing was probably necessary for the safety of the cargo; that the reloading and outward expenses were necessary for the purpose of carrying the voyage to a successful termination.

It was contended before us on the part of the plaintiffs that the case was completely bound by the decision in *Attwood* v. *Sellar* (22), because the putting into port to repair in this case was a general average act, and all the subsequent acts were the consequences of that act, just as much as all the acts subsequent to cutting away the mast were the consequences of that act in *Attwood* v. *Sellar* (22). It was further contended that if the case was not absolutely bound as by the authority of, yet it was within the principles on which the judgment in *Attwood* v. *Sellar* (22) was based. It was argued that there is no distinction between the cases of a ship putting into a port of distress for the safety of both ship and cargo after a damage in itself a general average sacrifice, or after a damage caused by perils of the sea or other accident; and that in all cases all such items as were in dispute in this action must follow the decision in *Attwood* v. *Sellar* (22). It was contended on behalf of the defendants that none of the disputed items could entitle the plaintiffs to a general average contribution, because they were incurred in order to enable the plaintiffs to earn their freight, and were incurred when neither ship nor cargo was in danger.

In order to support the argument on the part of the plaintiffs, Mr. C. Russell enunciated the following proposition as governing all questions of general average expenditure. The proposition, he said, which is affirmed by the decision in *Attwood* v. *Sellar* (22) is, that all extraordinary expenses are to be allowed as matters for general average contribution which were reasonably incurred for the benefit and safety of the whole adventure, or were the reasonable and natural consequences and results following upon an act done in view of danger to the whole adventure and for the benefit of the whole adventure. If this is a true proposition, in the sense in which it was intended by Mr. Russell that it should be accepted by us, it rules the case in favour of the plaintiffs. In order to determine whether we can adopt it in that sense, it is necessary to criticise it very carefully. It does not speak of expenses incurred merely for *safety* or *preservation*, but for *benefit and safety*. It does not speak of safety of *ship and cargo*, but of safety of *the whole adventure*. It does not speak of the expenses of an act of sacrifice done for safety, or of expenses incurred for safety, but of expenses *which were the reasonable and natural consequences and results following upon an act done for safety*. If "benefit" means the same as "safety," the phrase in which the word is used is tautologous; if benefit means more than safety, we must determine whether any other benefit than that of safety can be vouched in order to sustain a claim for general average. If by "the *whole adventure*" is meant only "ship, freight and cargo," it is but an equivalent phrase for "ship, freight and cargo"; but if more is meant, if it is intended to bring in a benefit to "the adventure of carrying the goods to their destination," we must determine whether such larger meaning can be recognised,

(22) 48 Law J. Rep. Q.B. 465; Law Rep. 4 Q.B. D. 342; in error, 49 Law J. Rep. Q.B. 515; Law Rep. 5 Q.B. D. 286.

Svensden v. *Wallace, App.*

We must further determine whether the description of the expenses which may be brought into account is not too expansive. It was urged that even if the proposition is stated in terms larger than has hitherto been recognised in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to enquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again that the English and American Courts have diverged upon this particular head of law, the law of general average. The question therefore must be, what is the law of England in this matter? The governing principle or proposition, which has been adopted in its terms by a succession of English Courts as the true statement of the governing principle, is that which was stated by Mr. Justice Lawrence in *Birkley* v. *Presgrave* (23). It has been considered to be one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate, as shew that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country. His proposition is thus expressed: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." This proposition, read with regard to expenses, will read thus: All loss which arises in consequence of extraordinary expenses incurred for the preservation of the ship and cargo comes within general average. But the loss which arises from an expense is the expense itself. Therefore we must read thus: Every expense incurred for the preservation of the ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of expenditure in respect of which a general average contribution in any given case is due, the question must be: Was this item of expenditure, at the moment it was incurred, incurred for the safety of both the ship and cargo? The word "benefit" is not used by Mr. Justice Lawrence, but it is used by Lord Kenyon in the same case. He says, "for the benefit of the whole concern." But the word "benefit," thus used by him with regard to the same facts in the same case in a judgment agreeing with the judgment of Mr. Justice Lawrence sitting by his side, must have been intended to mean the same as the word "preservation" used by that learned Judge. The words have been usually used as equivalent. Thus, Mr. Arnould, in stating the definition of a general average loss, says: "A general average loss may be defined to be a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the joint '*benefit*' of ship and cargo." And for his authority he cites, "*per* Mr. Justice Lawrence, in *Birkley* v. *Presgrave*" (23), where the word used is "preservation." In almost the next sentence Arnould says: "In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general *safety* of the whole adventure—that is, of the ship, cargo and freight." It is obvious on reading Arnould that he constantly uses the words as equivalent. And so have many Judges from time to time. Mr. Russell used the word "benefit" in his argument as having in his proposition a larger meaning than "safety" or "preservation," and therefore his proposition is in this respect intended to be, and is, larger than the proposition of Mr. Justice Lawrence. Again, Mr. Justice Lawrence says, "for preservation of '*ship and cargo*'"; but Mr. Russell says, "*for the whole adventure.*" Lord Kenyon speaks of "the whole concern." Arnould speaks

(23) 1 East, 220.

of "the whole adventure—that is, of the ship, cargo and freight"—thus giving his own equivalent. The point was distinctly argued in *Job* v. *Langton* (24). Mr. Mellish says: "It is contended on the other side that all extraordinary expenses incurred for the preservation of the *whole maritime adventure—that is, for bringing the ship and goods safely to their destination*—are general average. That is too wide a proposition." Mr. Blackburn argues: "The primary object is the *arrival of the ship with her cargo at her destination.* Ordinary acts done to bring *this* about are done by the shipowner as part of his duty; but extraordinary acts done *for this object* give rise to general average." Lord Campbell, dealing with this contention, says: "Mr. Blackburn's position, that the end in view of every maritime adventure being the *arrival of the ship with her cargo at her destination*, extraordinary acts done *to effectuate this* give rise to general average, would justify him in contending that these expenses do not constitute particular average; but unfortunately for him the expenses incurred in repairing the ship would, according to this reasoning, equally be general average." In that case, therefore, the point being distinctly raised, it was determined that the use of the phrase "for the benefit of 'the whole adventure,'" with the meaning given to it as used in his own proposition by Mr. Russell in his argument in this case, is contrary to the law of England. Here again, therefore, the proposition of Mr. Russell is too large. Again, Mr. Justice Lawrence speaks of every expense *incurred for the safety* of the ship and cargo, meaning, as I have said, that the question as to each separate item claimed must be: Was this item of expenditure, at the moment it was incurred, incurred for the safety of both ship and cargo? But Mr. Russell says all extraordinary expenses which were reasonably incurred for the benefit and safety of the whole adventure, or *were the reasonable and natural consequences and results* following upon an act done in view of danger," &c. The question under this as to an item would be: was this item of expenditure a reasonable and natural result in the ordinary course of business following upon some other act of sacrifice or some other act of expenditure? The difference is that, under the rule of Mr. Justice Lawrence, no act or item of expenditure could be allowed which was not itself directly done or incurred for the preservation of the ship and cargo; whereas under Mr. Russell's rule an expenditure would be allowed, which itself was not incurred for the preservation of the ship and cargo, if in the usual and natural course of business it would be incurred after some act of sacrifice done or some other act of expenditure incurred, which act was done, or which other expenditure was incurred, directly for the safety of ship and cargo. It is obvious that the proposition of Mr. Russell is larger than the rule of Mr. Justice Lawrence. But if the proposition of Mr. Justice Lawrence is the true and accepted law of England, as I think it is, no Court now existing has power to alter that principle while it is the law. We must reject the proposition suggested in argument and abide by the proposition decided in judgments.

We have to apply the rule as stated by Mr. Justice Lawrence to the case of a ship putting into a port of distress for repairs in consequence of damage done by sea perils. If there is danger to the preservation of both ship and cargo from destruction if the ship remains at sea, the act of putting into port to repair is an extraordinary act which may well be called a general average act. If in order to do that act an expenditure is reasonably incurred, that expenditure is a general average expenditure. If in order to do that act, towage, pilotage or inward dues must be paid, those expenditures are all and each general average expenditures. When the ship is in the port of distress for repair, other acts are often done and other expenditures are often incurred which must each be considered. Each of these must be considered as if it were the sole act or expenditure, and also whether it may be treated as a part of another act or expenditure. When the ship is in the port of distress, it often happens that the cargo is unloaded and warehoused or otherwise protected, and, if necessary, manipulated; the ship is repaired, the cargo is reloaded,

(24) 6 E. & B. 779; 26 Law J. Rep. Q.B. 97.

the ship is taken out to sea and proceeds on her voyage. When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. If both ship and cargo are in danger, it is impossible to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. But the ship alone may be in danger, as, for instance, of breaking her back on a falling tide if the cargo be left in her, though the cargo, from its nature, would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted; then the cargo must be landed, but solely for the safety of the cargo. Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo. In the first case the cost of unloading, treating the unloading as within itself the sole act done, is clearly a general average expenditure. In the second, third, and fourth cases the expenditure, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act. The only act to which they can be referred is the act of going into port to repair. In the second and third cases which arise, whether the repairs to the ship could or could not be done as a matter of carpentering without the cargo being removed, it cannot be truly said that the landing of the cargo is a part of the act of going into port to repair. In the fourth case, if you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going in to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship into such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase, "going in to repair." The expression then is going in for repairs. The real accurate meaning is going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such case is upon the hypothesis so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure. Treated in this way, which seems to be a not unreasonable way of treating the case as matter of business, the allowance of the item is not against the principle of law, and therefore is rightly allowed. When the cargo is landed, it may or may not, according to its own nature, or the circumstances of the locality, require to be warehoused or otherwise protected. It may, in consequence of partial damage already suffered, or from its own nature, require for its own safety to be manipulated, as, for instance, to be unpacked or dried; but such acts cannot possibly be necessary for the safety or preservation of the ship. She is at that moment safe or unsafe. But these acts cannot contribute in any way to her safety if she is unsafe. They cannot be said to be a part of the act of going into port to repair, they have no reference to the act of repairing, or of putting the ship into a position in which she can be repaired. They are therefore not within the principle. The repairing of the ship has nothing to do with the safety of the cargo. It is done in respect of the ship alone. The reloading of the cargo and the outward expenses are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule. They cannot be said to be a part of the act of placing the ship in a position to be repaired. Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress

in order to repair damage done by sea-peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses. It is said, however, that we are bound by the decision of the Court of Appeal in *Attwood* v. *Sellar* (22), or that we ought to decide this case according to the principles on which that case was decided. And if within ordinary rules that case binds us, I will not hesitate to obey it, though, with deference, I could not have agreed with it. In that case the vessel was obliged to put into port in order to repair the loss of a mast cut away in severe weather—in order, then, to save the ship and cargo from immediate danger. "The question," says the judgment, "is whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also." "We have therefore," it is afterwards said at page 294, "the law, as laid down by the Courts for a considerable portion of the period over which the practice of average adjusters stated in the special case extends, running counter to that practice, by recognising, as regards port of refuge expenses, a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it puts in for repair of damage caused by peril of the seas." "It is not necessary," it is said at page 297, "for us to decide in the present case whether *Hall* v. *Janson* (25) was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average if the original cause of damage to the ship had only been a cause belonging to particular average." After these quotations it is impossible, in my opinion, to say that the decision in that case binds us by authority in this case. The Court expressly stated that it did not decide what would be the law applicable to a case like the present. I purposely abstain from entering into all the observations made in the judgments of Lord Chief Justice Cockburn and Lord Justice Thesiger. I do not think that the real ground of the decision in *Attwood* v. *Sellar* (22) in the Court of Appeal was that all the acts done in a port of distress are one continued act. What is the one act? By what name can it be expressed? Warehousing the cargo, reloading it, going out of port, cannot be said to be parts of the act of taking the ship into port in order to enable her to be repaired. Reloading the cargo and taking the ship out of port, when the ship is repaired, cannot be parts of the act of repairing the ship. The real ground of the decision was, I think, that where the putting into port for repairs is the necessary consequence of a previous general average sacrifice, the law of England is as elastic in respect of the subsequent acts done and expenses incurred in the port as the American and other laws are stated to be in all cases of a ship necessarily putting into a port of distress to repair. And for that proposition there were before the decision in *Attwood* v. *Sellar* (22) many weighty *dicta* by English authors of authority and English Judges, but all which *dicta* drew a distinction between the going into a port of distress in consequence of a voluntary sacrifice, and of putting into port in consequence of a particular average damage. I adopt that distinction, because I do not think that we are bound in the present case by the decision in *Attwood* v. *Sellar* (22), and the propriety of that decision, with reference to the facts on which it was decided, we are not at liberty to question. I have carefully examined all the cases

(25) 4 E. & B. 500; 24 Law J. Rep. Q.B. 97.

cited to us. I do not think that any of them are decisive of the case before us. I therefore think it useless to enter, in this judgment, into a minute discussion of them. I have looked carefully into valuable books written by great average staters, but cannot accept their views on either side as authority. No one can study the law successfully without reading them. No one can give judgment without referring to them for valuable aid, but they must not rule the decisions of Courts as by authority. The only further reference I think it useful to make to former cases is, that in my opinion the decisions in *Da Costa* v. *Newnham* (26) and *Moran* v. *Jones* (27) cannot be supported. I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendants.

BAGGALLAY, L.J.—I have had an opportunity of perusing and considering the judgment which has just been delivered by the Master of the Rolls, and also that which will presently be delivered by Lord Justice Bowen, and I regret that I am unable to agree with them in thinking that this appeal should be allowed. I regret it, because I deem it very undesirable that so important a principle as that which will be affirmed by their judgments should have any doubt thrown upon its soundness by reason of any dissent on my part from the views expressed by them. I am very sensible in saying this I am attributing too much importance to my own views upon a subject with which they are much more familiar than I am; but having been a party to the judgment delivered by Lord Justice Thesiger in *Attwood* v. *Sellar* (22), which was the subject of much consideration by the Judges on whose behalf it was delivered, and having, since the arguments on this appeal were concluded, carefully reconsidered that judgment, I feel bound to express the opinion at which I have arrived, and to state concisely the reasons by which I have been influenced in forming that opinion. In doing so I propose, in the first place, to compare the circumstances under which the decision in *Attwood* v. *Sellar* (22) was arrived at with those with which we have to deal on the present appeal; for conciseness and convenience of comparison I will refer to the ships as *A.* and *B.*, and will deal with them as having encountered the same storm and as having sought the same port of refuge. The circumstances may be then stated as follows: Two ships, *A.* and *B.*, each on a voyage from a foreign port to Liverpool, and having a valuable cargo on board, encountered a violent storm; the master of *A.*, to avoid a more serious injury, cut away one of his masts; *B.* sprung a dangerous leak; both, *for the safety of ship and cargo*, put into a port of refuge *to repair the injuries they had sustained*; to effect such repairs and to enable the ships to prosecute their respective voyages, it became necessary in the case of each ship to discharge the whole or a portion of her cargo; in addition to the port dues and other expenses incident to her entering the port, further expenses were incurred in respect of each ship in unloading, warehousing and reloading her cargo whilst she remained in port, and for pilotage and other charges on leaving the port to prosecute her voyage.

The only difference between the circumstances of *A.* and those of *B.* was in the nature or character of the injury which occasioned her putting into port. The cutting away of one of the masts of *A.* was the subject of general average—in other words, her putting into the port of refuge was occasioned by *a general average sacrifice*; whilst the putting into port of *B.* was occasioned by her springing a dangerous leak, which was *a particular average loss.* But in each case the putting into port *for the safety of ship and cargo* was an act of sacrifice, giving rise to claims for general average contribution; in the case of *A.* this act of sacrifice followed, or was a continuation of, the original act of sacrifice, whilst in the case of *B.* it was itself the original act of sacrifice; in each case the proximate cause of the extraordinary expenses incurred was the putting into the port of refuge.

If it had been left to average adjusters, previously to the decision in *Attwood* v. *Sellar* (22), to adjust the losses in respect of the expenses incurred by the two ships, they would, in accordance with a practice

(26) 2 Term. Rep. 407.

(27) 7 E. & B. 523; 26 Law J. Rep. Q.B. 187.

of many years' duration, have dealt with them as follows: in respect of each ship they would have treated the expenses incurred in entering the port and of discharging the cargo as *general average*, those incurred in warehousing the cargo as *particular average on the cargo*, and the pilotage and other charges incidental to leaving the port as *particular average on freight*; the fact that in the case of *A.* the putting into port was occasioned by a general average sacrifice, whilst in the case of *B.* it was occasioned by a particular average loss, would in no way have affected the adjustment of the losses incurred by reason of the putting into port; and properly so, if I am correct in the view which I have expressed, that in each case the putting into port was an act of sacrifice and the foundation of a claim for general average contribution.

That the practice of the average adjusters was based upon the principle that the putting into port to refit is in itself an act of sacrifice, is evidenced by their treating the expenses incidental to entering the port of refuge and of discharging the cargo as the subject of general average contribution; upon no other principle could the practice be supported. But the decision in *Attwood* v. *Sellar* (22) established that, whilst the practice of the average adjusters was in accordance with legal principles, so far as it treated the expenses of entering the port of refuge and of discharging the cargo as the subject of general average contribution, it was erroneous in the case of *A.* in limiting the expenses, which were the subject of general average contribution, to those last mentioned, and that the expenses of warehousing and reloading the cargo and those incidental to leaving the port were equally the subject of general average contribution. But if, in the case of *A.*, the expenses of warehousing and reloading the cargo and of leaving the port were properly held to be the subject of general average contribution, I am unable to suggest any reason, satisfactory to myself, why the like principle should not be applied in the case of *B.*; in that case the expenses of unloading, warehousing, and reloading of the cargo and the coming out of port were as consequent upon the putting into port as they were in the case of *A.*; if they ought not to be treated as the subject of general average contribution in the case of *B.*, they ought not, according to the view which I take of the circumstances of the two cases, to have been so treated in the case of *A.*

It has been pressed upon us in argument that in the judgment which was delivered in *Attwood* v. *Sellar* (22) care was taken to avoid intimating any opinion as to how a case similar to that now under consideration should be dealt with. I cannot assent to this view of the scope of the judgment; it is doubtless true that it was not intended to express any decided opinion upon the question referred to, but attention is distinctly directed (see p. 289) to the case of a ship which has been damaged by perils of the sea and has subsequently put into a port of refuge, and a distinction as regards any claim to general average contribution is drawn between a case in which the goods are unshipped and in safety and the common danger consequently at an end before the ship puts into port, and one in which the goods are not unshipped until after the ship has put into port, and in which there is consequently a common danger at the time when the ship put into port. And similar views are indicated in the comments upon the case of *Job* v. *Langton* (24). For the reasons which I have thus concisely stated, I am of opinion that Lopes, J., arrived at a correct conclusion, and that the appeal should be dismissed.

Bowen, L.J. — This case raises the important question whether certain port of refuge expenses incurred by a vessel which, in consequence of a particular average loss, has put into port to repair are properly a subject of general average contribution. The plaintiffs are the shipowners and the defendants the owners of cargo. The vessel in her voyage from Rangoon to Liverpool met with heavy weather, and sprang a dangerous leak. The captain, for the sake of the preservation of ship and cargo, took refuge in the Mauritius, and was there compelled, in order to prosecute his voyage, to execute certain repairs upon the ship. In order to enable such repairs to be made the cargo

was landed, warehoused, and reloaded, after which the vessel sailed for Liverpool. The expenses of unloading cargo have been accepted by the defendants as the subject of general average contribution, and the defendants have admitted their liability to pay the whole storage or warehouse rent of the cargo. The action was brought to recover general average contribution from the cargo in respect of its reloading, and port charges, pilotage, and other claims subsequent to the reloading. The cause was tried before Mr. Justice Lopes, who held that the plaintiffs were entitled on all of the items in question to succeed, and this appeal is brought from his judgment in their favour.

It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger. Next as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This *pro rata* indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must therefore be recouped if the loss which the sacrifice causes is to be borne *pro rata*. "All loss," says Mr. Justice Lawrence, in the case of *Birkley* v. *Presgrave* (23), "which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested."

The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average, necessarily depends on the circumstances of each case. Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one. No supposed conveniences of calculation and no practice of average adjusters can justify taking one man's money to pay what by law is another man's individual loss. It has, however, been urged by the respondents' counsel that a more liberal view ought to be taken of the principles that regulate general average: and in particular with regard to port of refuge expenses. It is not necessary, it has been argued, that the expenditure or sacrifice should have been made for the common safety of ship and cargo, if it is made for the benefit of both and in order to enable the vessel to bring her voyage and the common adventure to a successful issue. This doctrine has been advocated by various writers, and has engrafted itself upon the law of more than one foreign country; but, whatever its theoretical value, it is not the law of England (see *Harrison* v. *The Bank of Australasia* (28)). Exceptional cases, such as those suggested in the judgments delivered in *Job* v. *Langton* (24) and *Walthew* v. *Mavrojani* (29), may be imagined in which the safety of the ship and cargo, and the safety of the common commercial enterprise, would be almost convertible terms, and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea might, on the ground of a physical danger common to both, be brought into general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea of a common commercial adven-

(28) 41 Law J. Rep. Exch. 36; Law Rep. 7 Exch. 50.

(29) 39 Law J. Rep. Exch. 81; Law Rep. 5 Exch. 116.

ture, as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo-owner. The chief English case of note in which language occurs that seems at first sight to favour the notion that a common adventure is the true criterion, is *Hall* v. *Janson* (25), where it was held that the unloading and reloading of cargo, for the sake of effecting repairs upon the ship, might give rise to a liability to contribution on the part of freight. Since freight perishes if the voyage is frustrated, it may not have been unreasonable to hold that freight ought to contribute to the expenses incurred in unloading and reloading a cargo, the unloading of which is solely undertaken for the sake of repairing the ship. This limited proposition, with which alone *Hall* v. *Janson* (25) was concerned, by no means warrants the conclusion that the cargo ought in turn to contribute whenever any expenditure is incurred, not of saving the vessel and its contents, but merely for the sake of prosecuting the voyage. In the subsequent case of *Walthew* v. *Mavrojani* (29), the English doctrine has been restated and explained, and the language of the Court in *Harrison* v. *The Bank of Australasia* (28) is to the same effect. We have been asked on another and a different principle to depart from the strict English theory in favour of port of refuge expenses following upon a particular average loss, upon the ground that they all form part of a continuous operation, the whole of which was contemplated by the captain at the time when he put into port. The intentions of the captain are no doubt material in considering the question whether the act done by him was performed only for the benefit of his ship, or for the common preservation of both ship and cargo. But it does not follow because his intentions are examinable to this extent, that everything which the captain intended in his own mind to do, after common safety should have been attained, also ought to be chargeable to general average. Intentions which go beyond what is needed for common salvation only shew that, in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average sacrifice, nor directly caused by one. On such a ground repairs of the ship in port ought themselves to be included, for the captain probably intended these: though he intended them as a means not of saving the cargo, but of earning his own freight. In my opinion the two tests which I have enunciated cannot be qualified or extended so as to embrace any such considerations.

The next step is to apply these two tests to the case before us, the damage which the vessel here received, and which compelled her to put into a port of refuge, being a particular average loss. And, first, as to the expenses of putting into port. Two views may theoretically be taken of the act of putting into port in a case like the present, though such expenses are now universally accepted as general average charges. These expenses might conceivably be considered as an exception to the general law, in virtue of which exception, though the bearing up for port was not a general average act of sacrifice in itself, its expenses are, for the sake of public policy, universally recognised as a subject-matter of contribution. The other and more general view is, that the bearing up for a port is to be treated as an act of general average sacrifice, because it is undertaken as a rule in the hour of danger for the common safety of ship and cargo (*Benecke*, p. 192). For the purpose of the present argument, I will assume that the latter view, which was pressed upon us by the respondents' counsel, is the more correct. We come then to the unloading of cargo when the port of refuge has been reached. In practice, it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate. Still, if strict theory were to

be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice—see *The Copenhagen* (30). If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice.

It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to oneself the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the deadlock that would otherwise ensue. Physical safety has been attained, and it appears to me to be the duty of the shipowner under his contract of affreightment either to proceed with his voyage or else to land his cargo, unless it is to be transhipped direct. In the case of *Plummer* v. *Wildman* (31), the unloading of the cargo, which was necessary for the repairs, was charged to general average; but in that case the repairs, owing to an antecedent sacrifice which necessitated them, were themselves held to be general average. In the case of *Hall* v. *Janson* (25), where the unloading was spoken of as chargeable to general average, the question at issue in the action was as to the liability to contribute, not of cargo, but of freight. In the present case the unloading expenses have been by common consent, and in conformity with a very common practice, dealt with as the subject of general average contribution; and it is not therefore necessary to decide what would be in other cases the law on the point.

The goods having been landed, there is an end of all danger common to ship and cargo. The contest between the parties in the present instance turns wholly on items of expenditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable if it can be shewn that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now *prima facie* warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice, so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how as between ship and cargo the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo. We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice—or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast, and has put into port to repair the damage so caused, and been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in *Attwood* v. *Sellar* (22), that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's

(30) 1 Ch. Rob. 289.
(31) 3 M. & S. 482 (1815).

decision to repair his ship and to unload and reload the cargo for that purpose. The charges of reloading in such a case ought in principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed.

I come, next, to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice; but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied, there might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter, and the cases where she puts in in order to repair damage and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought, the vessel might plausibly be said to come out simply because she previously went in. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in—for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour—but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo, and carrying on the voyage. The outward expenses ought, therefore, as it seems to me, in the present instance, to fall on freight.

I proceed, lastly, to consider the authorities with a view of enquiring whether any of them are inconsistent with the conclusions at which I have arrived above. The authority of *Da Costa* v. *Newnham* (26) has been so shaken by subsequent decisions that it cannot any longer be relied on. In *Plummer* v. *Wildman* (31) the question arose as to repairs and disbursements. The vessel had met with a collision which broke her false stern and her knees, and the master was in consequence obliged to cut away part of the rigging of her bowsprit and to return to port to repair the damage sustained by the accident and the cutting away. The ship could not have prosecuted her voyage nor kept the sea with safety without returning and repairing in Jamaica. On her return thither the cargo was relanded and warehoused in order that such temporary repairs might be done as would enable her to prosecute her voyage, and part of the disbursements consisted in the defrayment of these expenses. The plaintiffs, in an action for general average contribution, claimed, amongst other things, disbursements for pilotage inwards, for surveying, ascertaining and repairing the damage necessary for her to resume her journey, and the expenses of landing and warehousing and reloading, and crimpage to replace deserters during repairs. Lord Ellenborough and the rest of the Court allowed as general average so much of the expenses of repairs as were absolutely necessary to enable the ship to prosecute her voyage, but disallowed the captain's expenses in port. Mr. Justice Le Blanc adds that the unloading might be general average if it was necessary to repair the ship. But the language of the Court in this case can only be considered as consistent with later authority as it is explained and interpreted in *Power* v. *Whitmore* (32). The vessel in *Power* v. *Whitmore* (32) had suffered sea damage in a storm, and for the safety of ship and cargo put into Cowes, where she lay four days. She repaired her damage at Cowes, and sailed again the next day; but the day after was driven back by adverse winds and tempestuous weather, and remained at Cowes a fortnight farther. The question raised was whether the owner of cargo was liable to general average contribution in respect of the following items: (1) wages of the captain and crew at Cowes; (2) provisions consumed there; (3) repair of her bowsprit; and (4) supply of three coils of rope. All these charges were disallowed. Lord Ellenborough doubted the correctness of the language of Beawes cited in *Da Costa* v. *Newnham* (26), and distinguished *Plummer* v. *Wildman* (31), on the ground that the repairs of the ship were there rendered necessary to repair the original act of sacrifice—see *Harrison* v. *The Bank of Australasia* (28).

(32) 4 M. & S. 141 (1815).

In the case of *Hallett* v. *Wigram* (33) the question of general average contribution arose upon demurrer. It appeared upon the pleadings that the ship had encountered a storm and been compelled to return to Adelaide for repair. It was alleged upon the pleadings that the return to Adelaide, the unloading of the cargo, and the repair of the damage, were all necessary for the preservation of the ship and cargo, and that the repairs were necessary for the completion of the voyage and for the conveyance of the cargo to the port of delivery, which could not otherwise have got there, and that the master, being unable to raise money for the payment of the repairs, sold a portion of the cargo to enable him to do so. The Court held that the repair of the sea damage must be borne by the shipowner. Chief Justice Wilde quotes with approval the following passage from Abbott:—"It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port-charges, wages and provisions during the stay, are to be considered as general average; but, if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of shipowner 'to keep his vessel tight, staunch and strong' during the voyage for which she is hired." *Hall* v. *Janson* (25) has been cited by the counsel for the respondents as an authority to prove that the expenses of unloading and reloading cargo constitute a claim to general average contribution, though the original cause of putting into port was a particular average loss. The real question raised in *Hall* v. *Janson* (25), which was a case decided on demurrer, was whether the declaration set out facts from which a liability of the freight to contribute to general average might arise. All that was necessary for the purpose of the decision was the proposition that, under circumstances such as those set forth in the declaration, freight might be liable to contribute to general average. The expressions of Lord Campbell as to the liability of cargo when the expenditure has been necessary for the purpose of prosecuting the voyage are *obiter dicta* and at variance with later authority. That the unloading and reloading were necessary for the repairs of the ship may be an argument to shew that freight ought to contribute; but are inapplicable, as it seems to me, to the case of the cargo, which has not necessarily anything to do with the repairs of the ship.

In *Job* v. *Langton* (24) the ship with a general cargo on board had run ashore on the coast of Ireland, and it became necessary to discharge the whole of the cargo and ballast before she could be got off. The question which arose was whether the expenses incurred in getting off the ship and taking her to Liverpool for repair after the entire cargo was discharged, were chargeable to general average or to particular average to the ship alone, and the Court had power to draw inferences of fact. Lord Campbell and the Queen's Bench decided that the expenses were particular average on the ship, having been incurred after the cargo had been safely discharged and warehoused, and Lord Campbell points out that if the learned counsel's position for the defendants were true—that the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this gave rise to general average—it would follow by a parity of reasoning that expenses incurred in repairing the ship at Liverpool ought equally to be general average.

A question in *Moran* v. *Jones* (27) arose as to the liability of the cargo owner to general average. The inferences of fact drawn by the Court of Queen's Bench may or may not have been correct, but the decision has reference only to the special facts of that case.

In *Walthew* v. *Mavrojani* (29) it was decided that extraordinary expenses incurred in getting off a stranded ship after the cargo has been removed to a place of safety are not, in the absence of exceptional circumstances, general average. Chief Justice Bovill in his judgment refers with

(33) 9 Com. B. Rep. 580, 604 (1850); 19 Law J. Rep. C.P. 281.

approval to *Hallett* v. *Wigram* (33) and the judgment of Chief Justice Wilde, as also to the decision in *Job* v. *Langton* (24), and distinguishes *Moran* v. *Jones* (27). "The claim," he says, "has been put upon the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters of general average." "The proposition," says Sir J. Hannen, "that general average includes all extraordinary expenses incurred for the purpose of continuing the voyage, is not warranted by the principle which governs contribution to general average."

In *Harrison* v. *The Bank of Australasia* (28) a question arose as to the right of the shipowner to charge the cargo with general average contribution in respect of spars and wood cut up by the captain in an emergency to burn with his coal, of extra coal purchased from a passing vessel, and of injury done to a donkey-engine through its being continuously employed for pumping. The Court unanimously held that no claim to contribution arose in respect of the coals or the donkey-engine, but differed on the question of fact whether there was such an imminent peril as to justify the sacrifice of the spars and wood. But all agreed as to the principles which regulate the law of general average. Baron Cleasby expresses himself as follows:—"Some difficulty is created in this case by referring to American authorities on this subject, and to *Stevens on Average*, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to shew that imminency of danger was not necessary to make the expenses incurred by a vessel in going into port to repair a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss are in England the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expenses attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made, do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America—3 *Kent's Commentaries* (10th edition), p. 329 and note." Chief Baron Kelly, in delivering the judgment of himself and Baron Bramwell, adds "that the ingredients of a case of general average are—peril of the seas imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all." And he proceeds to cite as the true principle applicable to these cases the passage from *Abbott on Shipping* referred to by Chief Justice Wilde in the case of *Hallett* v. *Wigram* (33), which I have already mentioned.

We have, however, been asked to consider the present case as governed by the judgment of the Court of Appeal in *Attwood* v. *Sellar* (22), where it was held that port of refuge expenses of the same character as those now in issue were properly chargeable to general average. The broad and obvious distinction is that in *Attwood* v. *Sellar* (22) there was a general average sacrifice of a portion of the ship herself which rendered necessary the repairs of the vessel in port, and the unloading, warehousing and reloading of the cargo for that purpose. The Court of Appeal in terms abstained from pronouncing on the question that now has arisen, and, unless it follows as a necessary implication from their judgment that the port of refuge expenses ought to be similarly treated when there is no general average act which renders necessary any unloading or repairs in port, the matter is not concluded by that authority. The principle of law, however, that appears to be the basis of the decision in *Attwood* v. *Sellar* (22) is, that an expenditure directly caused

by a general average sacrifice is part of the loss that it entails, and becomes the subject of general average contribution. The port of refuge expenses which the present respondents claim to treat as general average have not been caused by the putting into port, and there was no still earlier general average sacrifice to cause them as in *Attwood* v. *Sellar* (22). They cannot, therefore, in the present case be said either to be general average sacrifices themselves or caused by any general average sacrifice. In my opinion the judgment of Mr. Justice Lopes ought to be reversed, and the action dismissed with costs here and below.

Appeal allowed.

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Waltons, Bubb & Walton, for defendants.

[IN THE COURT OF APPEAL.]

1883. Nov. 26, 27. 1884. April 9.

BURDICK *v.* SEWELL AND ANOTHER.*

Ship and Shipping—Bill of Lading—Indorsement by Shipper as Security for an Advance—Transfer of Property in Goods—Liability of Indorsee for Freight—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 1.

N. having shipped goods in London, in a vessel belonging to the plaintiffs, to be carried to Russia, obtained from the defendants a loan, and, as security for the advance, indorsed to them the bill of lading of the goods so shipped. The goods arrived in Russia, and on being sold there in accordance with the Russian law, realised only enough to satisfy the custom-house charges. Thereupon the plaintiffs sued the defendants for the freight and charges, on the ground that the property in the bill of lading of the goods had passed to the defendants within the meaning of the Bills of Lading Act, and that the defendants were therefore liable as indorsees of the bill of lading:—Held, *by* BRETT, M.R., *and* BAGGALLAY, L.J. (*dissentiente* BOWEN, L.J.), *that the defendants were liable to the plaintiffs for the freight and charges claimed, inasmuch as the bona fide indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee.*

* *Coram* Brett, M.R.; Ba gallay, L.J., and Bowen, L.J.

Appeal from the judgment of Field, J., on further consideration. The case is reported 52 Law J. Rep. Q.B. 428.

The action was brought by the plaintiffs, the owners of the ship *Zoe*, to recover 174*l.* 8*s.* 9*d.*, freight and charges in respect of certain cases of machinery shipped in the *Zoe* by one Nercessiantz, and carried to Poti, a Russian port on the Black Sea, under a bill of lading by which the goods were made deliverable to the shipper or assigns.

The defendants were bankers at Manchester, with whom Nercessiantz had had previous business transactions, and they became indorsees of the bill of lading as a security for the loan made by them to Nercessiantz while the ship was at sea. Having obtained the advance, he represented to the defendants that he was about to go to Poti, that the amount advanced would be repaid before he left England, and that he would make definite arrangements for that purpose; but he failed to do so.

The ship arrived at Poti in due course, and the goods, not having been cleared within the time limited for that purpose, were sold in accordance with Russian law, but did not realise more than was required to satisfy demands of the custom-house. The plaintiffs thereupon claimed payment of the freight and charges from the defendants as indorsees of the bill of lading.

Field, J., before whom the action was tried without a jury, gave judgment for the defendants.

The plaintiffs appealed.

Hall, Q.C., and *Edwyn Jones*, for the appellants.—Where a bill of lading is indorsed to secure an advance, unless there is something to shew the contrary, the inference is that the legal property in the goods is intended to pass by that indorse-

ment. The whole of the legal property passes; but for this case it is sufficient to argue that some property passed. If section 1 of the Bills of Lading Act (18 & 19 Vict. c. 111) was meant to apply only to the person to whom the entire property passed untrammelled by legal or equitable rights, it would have been so expressed. By "property" is meant not mere possession, but the right to deal with the goods and to sue in respect of them; otherwise no bankers would take the security. The law merchant has regarded the indorsement of a bill of lading for an advance as a different transaction from a mere pledge. In *Lickbarrow* v. *Mason* (1) the jury found that by the indorsement and delivery of a bill of lading the property in the goods is transferred, and there is no limitation in the terms of the special verdict. Buller, J., said that the first question in the cause was, whether at law the property in goods at sea passes by the indorsement of the bill of lading; and he decided that it did. At the end of his opinion he said that the legal property was in the plaintiff; that the right of seizing *in transitu* was founded on equity; and that no case in equity had ever suffered a man to seize goods in opposition to one who had obtained a legal title and had advanced money upon them. The case of *Hibbert* v. *Carter* (2) does not apply, for it merely decided that the indorser had an equitable right entitling him to sue; and Buller, J., in *Lickbarrow* v. *Mason* (1) cites it as deciding that the legal property passes, and not as favouring the distinction now suggested. In *Meyerstein* v. *Barber* (3), though it was unnecessary for the decision, it was decided by Lord Hatherley and by Lord Westbury that a property passed by the indorsement. In the case of *Glyn, Mills & Co.* v. *The East and West India Dock Company* (4) the plaintiff was in a different position from the present plaintiffs, for the indorsement was not general; but the point as to the effect of the indorsement was considered both by Brett, L.J., and by Baggallay, L.J. In the House of Lords that question was not decided. These cases shew that sufficient property passes by an indorsement for an advance to enable a plaintiff to sue under the Bills of Lading Act. The intention of the Act, as shewn by the preamble, is to pass the property in any case of ordinary indorsement without limitation. Here there is nothing to shew that Nercessiantz intended to confine the effect of the indorsement. The word "may" is used in the preamble of 18 & 19 Vict. c. 111, because there may be an indorsement, as to an agent, which passes no property.

The case of *Short* v. *Simpson* (5) was also cited.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Danckwerts*, for the respondents.—The pledgor of goods or of a bill of lading does not divest himself of the right of property in what he pledges. Wherever a bill of lading is dealt with, it depends upon the intention of the parties whether the property passes or not—*Hibbert* v. *Carter* (2)—and it only passes where it would have passed if the parties instead of dealing with the symbol of the goods had been dealing with the goods themselves. In the present case the transaction was one of pledge only, and if the other propositions are right, the defendants are not liable under the Bills of Lading Act, for then it is not applicable to the circumstances of this case. The term "special property," as applied to the interest of a person to whom the property is pledged, is a mere description of the rights which he has for the protection of the goods—as the right of possession, and, in certain circumstances, of sale. In *Newsom* v. *Thornton* (6) Lord Ellenborough said that, in considering whether an indorsement of a bill of lading passes the property, the intention of the parties must be considered as though they were actually dealing with the goods. In *Turner* v. *The Trustees of the Liverpool Docks* (7), Patteson, J., said that vendors, by

(1) 1 Sm. L.C. (8th ed.), 753, at p. 788.
(2) 1 Term Rep. 745.
(3) 39 Law J. Rep. C.P. 187; Law Rep. 2 C.P. 61; in the House of Lords, 39 Law J. Rep. C.P. 187; Law Rep. 4 H.L. 317.
(4) 50 Law J. Rep. Q.B. 62; Law Rep. 6 Q.B. D. 475; in the House of Lords, 52 Law J. Rep. Q.B. 146; Law Rep. 7 App. Cas. 591.
(5) 35 Law J. Rep. C.P. 147; Law Rep. 1 C.P. 248.
(6) 6 East, 17.
(7) 6 Exch. Rep. 543; 20 Law J. Rep. Exch. 393.

indorsing and depositing the bills of lading with a bank as a security, did not divest themselves of the property in the goods which they had reserved. In *Jenkyns* v. *Brown* (8) an indorsee of a bill of lading, which was handed to the defendant as security for an advance, was held to have "a special property." The meaning of "special property" may be shewn by the cases under the Stamp Acts as to the difference between pledges and mortgages —see *Harris* v. *Birch* (9) and *Attenborough* v. *The Commissioners of Inland Revenue* (10). In *Meyerstein* v. *Barber* (3) Erle, C.J., recognised the distinction between a mortgage and a pledge, and treated that case all through as one of pledge. So also did Martin, B. In *Johnson* v. *Stear* (11) a pledgor succeeded in an action of trover; but if the view is right that there is no property in a pledgor, he could not have sued—see also *Donald* v. *Suckling* (12) and *Franklin* v. *Neate* (13).

Blackburn on Sale (p. 279), *Benjamin on Sale* (2nd ed., p. 722), *Story on Bailments* (s. 297) and *Kemp* v. *Falk* (14) were referred to.

Hall, Q.C., in reply, referred to *The Freedom* (15) and *Pease* v. *Gloahec* (16).

Cur. adv. vult.

The following judgments were delivered on the 9th of April, 1884:—

BRETT, M.R.—In this case the material facts seem to be that the goods in respect of which freight is demanded in this action were shipped on board the plaintiffs' ship, the *Zoe*, by one Nercessiantz, to be carried to Poti in Russia; that Nercessiantz applied to the defendants (who were bankers in Manchester) for, and obtained from them, a loan or advance, and, as a security for the advance, indorsed to the defendants the bill of lading of the goods; that circumstances arose under which the goods were landed and warehoused in Poti with a stoppage for freight; that the goods were sold under Russian law for duties and charges, and were sold for an amount which left nothing applicable to answer the claim for freight. Thereupon the plaintiffs demanded the freight from the defendants.

The case was tried before Mr. Justice Field without a jury; and he held, as a matter of law, that he was entitled to enquire whether, and he found as a fact that, the intention of Nercessiantz and the defendants was that the transaction was to be only a pledge—that is, that the intention was, not to pass and to take respectively the whole legal property, subject to an equity as to redeeming it, or as to a balance, if any, after a sale, but to pass and take respectively only a pledge. The learned Judge then held, as the result of that intention, that the legal property in the goods did not pass to the defendants, that the Bills of Lading Act did not apply, that there was no contract between the plaintiffs and defendants, and that the plaintiffs could not maintain their action for freight against the defendants.

Against this judgment the plaintiffs appeal.

The ultimate question of course is whether, under the circumstances, the property in the goods passed by the indorsement of the bill of lading to such an extent as to bring the case within the Bills of Lading Act (18 & 19 Vict. c. 111). That depends very nearly, if not quite, upon the question stated by Mr. Justice Field at pp. 367 and 368. "The question in the present case," he says, "resolves itself into this, whether the security was intended to operate, or, by implication of law arising upon the undisputed facts, did operate, in the same way as an assignment by bill of sale or as a pledge." I should rather put the question thus: Does or does not the indorsement of a bill of lading as a security for an advance, as distinguished from an indorsement of it upon a sale of it or of the goods named in it for a price, by necessary implication

(8) 14 Q.B. Rep. 496; 19 Law J. Rep. Q.B. 286.
(9) 9 Mee. & W. 591; 11 Law J. Rep. Exch. 219.
(10) 11 Exch. Rep. 461; 25 Law J. Rep. Exch. 22.
(11) 15 Com. B. Rep. N.S. 331; 33 Law J. Rep. C.P. 130.
(12) 35 Law J. Rep. Q.B. 232; Law Rep. 1 Q.B. 585.
(13) 13 Mee. & W. 481; 14 Law J. Rep. Exch. 59.
(14) 52 Law J. Rep. Chanc. 167; Law Rep. 7 App. Cas. 573.
(15) Law Rep. 3 P.C. 594.
(16) 35 Law J. Rep. P.C. 66; Law Rep. 1 P.C. 219.

operate in the same way as an assignment of goods by a bill of sale—that is, so as to pass the whole legal property in the goods to the assignee, leaving to the assignor an equity in the proceeds beyond the advance secured and expenses; or may evidence be given of other accompanying facts from which it may be inferred that the intention of the parties was, and therefore that the legal result is, that there was only a pledge of the bill of lading or of the goods named in it? That question put more tersely is: Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee, with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?

First, let us consider the consequences of the opposite views. Let the transaction be treated as a pawn or pledge of the bill of lading or the goods. If of the bill of lading, then there is no common law power in the pledgee to use the bill of lading at all; there is no power to sell it before the time when, according to the contract of pledge, the article pledged is forfeited—and, until a late statute, an authorised sale of it before that time would have passed no right to the vendee. If of the goods, there is no valid pledge unless the delivery of the bill of lading is treated as a delivery of possession of goods to the pledgee. But a delivery of a bill of lading is not a delivery of the possession of the goods to the pledgee, though when speaking of its effect to pass property it has often been said to have the same effect as a delivery of possession of the goods; it gives to the indorsee a right to possession on arrival of the ship on payment of freight. It is because it does not give to the indorsee the possession, but that the possession is in the captain of the ship, that the original vendor may, under given circumstances, stop *in transitu* the goods in which he has no longer any property, and that the captain has a lien on the goods for his freight, charges, &c. And if the indorsement of the bill of lading is only a pledge of the goods, yet where the pledgee is not otherwise a factor, the mere pledge before the time of forfeiture given by the particular contract of pledge would not, by any Factors Act, or any other statute until a recent one, or by common law, have enabled the holder of the bill of lading to sell the goods or (if he assumed to sell them) to pass any right by such sale.

It follows that any merchant, banker or other asked to advance on the security of a bill of lading must have enquired, not only whether it was indorsed for value, but as to what were the terms on which the value was given and the indorsement made. And as to insurance, if the legal property does not pass, inasmuch as certainly in equity the whole interest does not pass, the indorsee for value of the bill of lading cannot insure in his own name for more than his real interest. Whereas if the indorsement for value is treated as a mortgage, the terms of the equity relating to it were settled between the parties by a contemporaneous writing, and for a breach of those terms there was always between the parties a remedy in equity, and the free dealing with the bill of lading in the general mercantile business of the country was not hampered. He who held the bill of lading with an interest in it could realise his interest by a legal sale, could protect all interests under it by an easy insurance. The purchaser of the bill of lading could buy with safety, and therefore could give a better price.

The one view tended, as pointed out by Mr. Justice Buller in *Lickbarrow* v. *Mason* (1), to inconvenience, the other to facility, in mercantile business. He points this out, as it seems to me, as a reason upon which the custom of merchants, on which his judgment was founded, came to be in existence.

If the general understanding of merchants had not been, in accordance with the verdict of the jury in *Lickbarrow* v. *Mason* (1), accepted in its largest sense, there would, one would think, have been many cases in the books raising the question; but no such thing is known in any book. The only mode of accounting for this is to say that merchants have treated the indorsement of a bill of lading for value as equivalent to a bill of sale.

It has been suggested that a decision in favour of the plaintiffs in this case will now hamper trade, because it will make, by reason of the Bills of Lading Act, a merchant who takes a bill of lading only as a security for an advance, so as to be in reality only partly interested in the bill of lading, liable for unknown claims under it by the shipowner who granted it. As to the liability to pay freight, it can only be important in such an isolated instance as the present, because the security for the advance can rarely be available until the lien for freight is satisfied. The amount of the advance is always calculated according to the value of the goods, less the freight. And so in respect of any other claim subject to a shipowner's lien. If the bill of lading by reference to a charter-party incorporates other and unusual liabilities, the merchant asked to advance will examine the charter-party and only advance a more limited amount. A loaded bill of lading is of little value. A decision in favour of the defendants would retain in the suggested case of a mere pledge the difficulty which the Bills of Lading Act was passed to obviate—namely, that the pledgee will have rights in the property but no rights in the contract. If he desires to protect the goods by the contract, and his interest in the goods, which is the first interest involved by a breach of the contract of carriage, he must first revert to the old inconvenience of being obliged to use the pledgor's name. Mercantile convenience seems to me to lean strongly in favour of a decision for the plaintiff in this case.

The case, however, must after all depend upon authority; it must depend upon the sense in which it is now considered that the finding of the custom of merchants by the jury in *Lickbarrow* v. *Mason* (1) has been adopted by the Courts so as to be taken to be the law merchant without further proof. In order to determine this, it may be well to examine some of the cases which were described before and which were cited in the case of *Lickbarrow* v. *Mason* (1), as well as that case and the cases after it. The question is, does the *bona fide* indorsement of a bill of lading as security for an advance, as distinguished from an indorsement upon a sale for a price, pass the whole legal property in the goods named in the bill of lading to the indorsee, leaving equities to the indorser.

The third case put by Chief Justice Holt in *Evans* v. *Martlett* (17) is a bill of lading to A, "and the invoice only" (that is, the invoice alone) "shews that they are upon account of B. A ought always to bring the action, for the property is in him, and B only has the equity." This does not state in terms whether the bill of lading is originally made to A, or is indorsed to A. The terms are large enough to include an indorsement to A for value, and then B's interest is stated to be only one in equity. The action mentioned is obviously an action of trover.

In *Hibbert* v. *Carter* (2), the plaintiffs were merchants in London, agents and general consignees of one Kerr, who was the owner of goods, and shipped them from Jamaica. The plaintiffs having received advice that the goods were shipped, insured them; but, before they had effected the insurance, Kerr had indorsed the bill of lading to one Dellprat in Jamaica, for an arrear due on a mortgage. Mr. Justice Buller was of opinion that Kerr had no insurable interest, because this indorsement of the bill of lading had passed the whole property to Dellprat, yet Kerr had not sold the goods. The Court was of the same opinion as to the legal property, but held, nevertheless, that Kerr might have an insurable interest. In what respect? Obviously in respect of his equitable interests, his right to redeem, and to a surplus, if any, on a sale.

In *Wright* v. *Campbell* (18) the action was in trover by the assignees in bankruptcy of one Scott. Fontaine shipped the goods and took bills of lading, and indorsed one copy to Swanwick in Liverpool, in order that Swanwick might sell the goods for him as factor. Swanwick indorsed this copy to Scott to secure him on his becoming bail for Swanwick, and also as security for a debt due from Swanwick to Scott. Scott demanded the goods on the arrival of the ship, but was refused. The goods were delivered to and sold by

(17) 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 290.

(18) 4 Burr. 2046.

the defendants. The action was in trover by the assignees of Scott. There was no sale for a price by Swanwick to Scott. Swanwick, being a factor, could not pledge to Scott; but, as factor, he had a right to pass the property to Scott for value. The decision is that, if the transaction was *bona fide*, the indorsement to Scott for value passed the property to Scott: it did so although the value given was not the price for a sale. And Lord Mansfield is reported by Mr. Justice Buller to have approved of the case in *Lord Raymond*—*Evans* v. *Martlett* (17)—upon an interpretation of it in its widest sense.

It was after these views thus expressed that arose the case of *Lickbarrow* v. *Mason* (1), upon the interpretation of the decision in which the present question depends. In that case the facts were that Turing & Son sold goods to Freeman on credit, and shipped them to Freeman, and sent him bills of lading. Freeman indorsed the bills of lading to the plaintiffs as security for an advance, and became insolvent before the arrival of the goods. Turing stopped the goods *in transitu* by indorsing a copy bill of lading to the defendants to enable them to do so on his behalf. The defendants sold the goods for Turing. Action of trover by the plaintiffs against the defendants. The defendants demurred to the evidence, or, in other words, asserted that there was no evidence on which it could be legally held that the plaintiffs were entitled to succeed. It was argued for the plaintiffs that as between the consignor and consignee the bill of lading is a mere authority by the consignor to the captain to deliver the goods to the consignee, and to the consignee to receive them, and that the consignee cannot transfer a greater right than he has—that is, a right to receive the goods, if the authority given to the captain is not countermanded. It was argued for the defendants that the *bona fide* indorsement for a valuable consideration of a bill of lading to a third person is an absolute transfer of the whole property. It was not suggested on either side that there was a question of intention, to be determined by a jury, or an inference of fact. It is clear that every one assumed that the bill of lading was indorsed in order to secure to the plaintiffs the amount of their advance, leaving the surplus, if any, for Turing. No one suggested that there was, independently of the indorsement of the bill of lading, a contract of sale of the goods for a price as between Turing and the plaintiffs. Under these circumstances Mr. Justice Buller says in his judgment in the King's Bench: "I make the question even more general than it was made at the bar—namely, whether a bill of lading is by law a transfer of the property." He does not say "whether a bill of lading, given under the circumstances of this case, is a transfer of the property," but "whether a bill of lading is by law a transfer of property." It is obvious that he was speaking of a bill of lading indorsed for value. He cites *Wright* v. *Campbell* (18), and then says that "Lord Mansfield" in that case "said that, since the case in *Lord Raymond*, it had always been held that the delivery of a bill of lading transferred the property at law." "If so" (says Mr. Justice Buller), "every exception to that rule arises from equitable considerations which have been adopted in Courts of law." "Thus," he says in his opinion delivered in the House of Lords, "stand the authorities on the point of legal property; and from hence it appears that for upwards of a hundred years past it has been the universal doctrine of Westminster Hall that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, nor even a *dictum* if properly understood, which impeaches this long string of cases." It has been observed that these statements of the law are not literally correct, because they do not exclude an indorsement to a mere agent. But Mr. Justice Buller had already in the same judgment, referring to a case before Lord King, disposed of an indorsement to "a pure factor without any demand of his own." "I agree," he had said, that he would have no property, because in such a case "the factor is only a servant or agent." "But then," he said, "it remains to be proved that a man who is in advance or under acceptances on account of the goods is simply and merely a servant or agent, for which no authority has been or, as I believe, can be produced." It is

with regard to the case of a man who is in advance on account of goods that his whole judgment is dealing. The whole case of *Lickbarrow* v. *Mason* (1) deals with such a person. It is to me impossible to suppose, it seems to me perverse to assume, that the question finally left to the jury was not a question put, and understood to be put, with regard to such a man. The dispute was between such a man and the plaintiff. It was with regard to that dispute that the jury found "that, by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns are, after the shipment and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery or transmitting of the same to any other person, and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person." If the contention made now on behalf of the defendants be true, that answer ought not to have been accepted. It made the custom too large. It ought to have contained the limitation, "if so intended." If the present contention be true, a question was not asked which ought to have been asked—namely, did the parties intend the transaction to be a pledge or mortgage? I cannot bring my mind to believe that everybody concerned in that long discussion omitted to consider the proper limitations of the general principle which everybody was trying to discover and which Mr. Justice Buller expressed. It was, then, in a case where the bill of lading was indorsed to secure an advance that, after long and exhaustive discussion and two trials, the House of Lords held, without any one even referring to the idea that in any such case an enquiry must be made as to what was the intention of the parties, that by the general custom of merchants the *bona fide* indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee, leaving the ultimate account between the parties to be settled as an equity. Such a decision I cannot depart from. I can be no party to explaining it away. I accept it as I firmly believe it was intended. To do otherwise restores the judgment of Lord Loughborough. The judgment governs the present case. According to it the whole legal property in the goods represented by the bill of lading passed by the indorsement of the bill of lading to the defendants. If so, it cannot be doubted that, by virtue of the Bills of Lading Act, the liability under the contract contained in the bill of lading passed also to and against the defendants, and that the plaintiffs were and are entitled to recover the freight in dispute. I cannot agree with the judgment of Mr. Justice Field, and, in my opinion, it should be reversed.

BAGGALLAY, L.J.—The plaintiffs in this action are the owners of the ship *Zoe*, on which certain cases of machinery were shipped and carried to Poti, a Russian port in the Black Sea. The defendants are bankers at Manchester; and while the ship was at sea they made an advance to the shippers of the goods, who delivered over to them the bill of lading, duly indorsed, as a security for the loan. No memorandum of charge or other formal document indicative of the intention of the parties was executed; but it was represented by the shipper to the defendants that he was about to proceed to Poti to superintend the delivery of the machinery, that the amount advanced would be repaid before he left England, and that he would call again and make definite arrangements for that purpose. He failed, however, to carry out the representations so made by him.

The ship arrived at Poti in due course, and the goods, not having been cleared within the time limited for that purpose, were sold in accordance with Russian law, but did not realise more than was required to satisfy the demands of the Russian custom-house. The plaintiffs thereupon, treating the property in the goods as having passed to the defendants by virtue of the delivery to them of the indorsed bill of lading, and relying upon the provisions of the Bills of Lading Act, demanded from the defendants payment of the freight and incidental charges, and, upon the refusal of the defendants to make such payment, commenced the present action.

The action was tried before Mr. Justice Field without a jury and that learned

Judge held that no sufficient property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading to render them liable to the plaintiffs, and he gave judgment for the defendants. From that judgment the present appeal has been brought.

The first question for consideration is, what was the effect of the delivery to the defendants of the indorsed bill of lading?

With all respect for the contrary opinion expressed by Mr. Justice Field, and which is, I believe, concurred in by Lord Justice Bowen, I am of opinion that, for reasons which I will very concisely state, the legal property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading.

I do not propose to examine or discuss the numerous authorities which have been cited in the course of the argument upon this appeal; the most important of them have been carefully examined by the Master of the Rolls in the judgment which he has just delivered, and they had previously been fully examined by him in the case of *Glyn* v. *The East and West India Dock Company* (4). I shall content myself with referring to that portion of his judgment in this last-mentioned case which had reference to the effect of the delivery of an indorsed bill of lading. In that judgment the Master of the Rolls distinguished between the legal effect of the transaction in transferring the legal property in the goods, and the equitable rights that might be reserved to the borrower by express agreement between the parties, or might be implied in his favour from the general circumstances of the case, and, after referring to a suggestion that had been made in argument that the indorsement of the bill of lading, when accompanied by such a letter of charge as had been given in that case, might not have the same fulness of effect in passing the property as if there were no letter of charge, he proceeded as follows:—"I am of opinion that an indorsement of a bill of lading for an advance does, by the mercantile law of England, pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world, except some one who may have an independent superior legal right of temporary possession. The right of a borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by common law to pass the legal property in goods, and in either case an equity may be reserved, which is still an equity, though recognised by the common law Courts." This is, in my opinion, a clear and correct exposition of the true effect of the delivery of an indorsed bill of lading as a security for a loan; the legal property in the goods named in the bill of lading passes to the lender, but subject to the equitable rights of the borrower, the nature and extent of which must be gathered from the circumstances of the transaction. It may be, and probably is the case, that certain equitable rights and liabilities were created between the borrower and lender in the present case by the representations made by the former at the time of the loan and other circumstances of the transaction; but the existence of such equitable rights and liabilities cannot, in my opinion, affect the legal effect of the delivery of the indorsed bill of lading. If it be the true effect of the delivery of the indorsed bill of lading to the defendants that the legal property in the goods passed to them, it can hardly be disputed that they became liable under the provisions of the Bills of Lading Act to pay the amount of freight claimed from them in the present action.

BOWEN, L.J.—I regret to find myself at variance with the other members of the Court. In this case there are two questions—the first is, whether any and what property in the cargo passed to the defendants upon the indorsement and delivery of the bill of lading. The second, whether the passing of any such property as passed was a passing of the property within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111, so as to render the defendants liable to freight at the suit of the shipowner.

What property, if any, passes upon delivery of an indorsed bill of lading, appears to me to be a question of fact in

each case, which depends, so far as the rights between themselves of the immediate parties are concerned, on the express or implied agreement between them. The owner of the merchandise may do whatever he pleases with his goods: he may sell them, or mortgage them, or pledge them. It is a pure question of bargain whether he delivers them upon terms which part with the entire beneficial interest in them; or which part with the entire legal interest, reserving an equitable right to himself; or which part with a special property only in them, reserving to himself the general and absolute property at law.

The freedom of disposition which owners of property possess when their property is on shore belongs to them equally when it it is afloat. They can, if they please, sell the bill of lading, or transfer it upon terms which amount either to a mortgage or a pledge. For a bill of lading is a symbol of the goods themselves. The cargo being at sea, no actual delivery of it is possible before the ship arrives. During the period of transit the bill of lading becomes and remains the token or symbol of the goods, and the delivery and indorsement of it is equivalent, so far as the passing of the property is concerned, to a symbolical delivery of the goods. Upon principle, therefore, apart from authority, one would suppose that it is to the agreement between the original parties that we ought to look, if we wish to discover the effect as between themselves of a delivery of the indorsed bill of lading, just as it is to the agreement between them that we should look to determine the legal consequences that follow on the corporate delivery of the goods. We should expect, in some cases, to find that the entire property had passed, in others, that there had been some different arrangement. Nobody denies that in many instances the transfer of the indorsed bill of lading passes the complete property, nor indeed that it is *prima facie* evidence of its passing—see *Dracachi* v. *The Anglo-Egyptian Bank* (19). But this does not prove that where the bargain is different the same effect follows, any more than because the property in a watch often passes on delivery, it follows that a watch cannot be pledged or mortgaged.

It has been argued before us that there is an implication of law, derived from the custom of merchants, that by indorsement and transfer of a bill of lading for an advance, the absolute property in the cargo vests in the indorsee. In support of this contention reference has been made to the language of the present Master of the Rolls in *Glyn* v. *The East and West India Dock Company* (4). The language of Lord Bramwell in the same case, on the other hand, is in favour of a different view.

Lord Blackburn, in the House of Lords, abstained from expressing an opinion as to which represented the true nature of the transaction in that particular instance; but even if the transaction in that particular case had been held to amount to a mortgage, it would not follow that a different transaction did not amount to a pledge only, and the decision would not, as it seems to me, have militated against the principles I have above explained.

It was further contended by the appellants that the well-known opinion delivered by Mr. Justice Buller in the House of Lords in *Lickbarrow* v. *Mason* (1) lays it down as law that, by the indorsement and delivery of a bill of lading, the complete property in goods at sea passes; and that on the second trial of that case a Guildhall jury found that there was a custom of merchants to that effect. Both judgment and verdict must, as it seems to me, be read with reference to the facts of the case itself. Freeman, the consignee of the cargo, had sent to the plaintiffs three bills of lading, together with the invoice of the goods, in order that the goods might be taken possession of and sold by them on Freeman's account, and the plaintiffs had accepted and paid bills of exchange to the value of 520*l.*, drawn upon them by Freeman against the goods. The truth of the case, says Mr. Justice Buller, was that Freeman transferred the legal property in the goods to the plaintiffs, who were to sell them to pay themselves the 520*l.* advanced in bills out of the produce, and to be responsible to Freeman for the remainder, if any. It was with reference to this transaction, a transaction of which the very essence was that the property in the

(19) 37 Law J. Rep. C.P. 71; Law Rep. 3 C.P. 190.

goods was intended to pass, if the indorsement of the bill of lading could properly be given that effect, that Mr. Justice Buller discussed the question whether the property in the goods at sea passes by the indorsement of the bill of lading. What is the proposition of law that he lays down as clear? That "every authority which can be adduced, from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee." In other words, property passes by delivery of the indorsed bill of lading where it would pass by the delivery of the goods themselves. And it was with reference to the same transaction that the special verdict was found as to the custom. The question of the effect of an agreement between the parties when no property or only a qualified property was intended to pass with the bill of lading did not arise, nor was it submitted to the jury. Can it be inferred, from a verdict so found, that the jury intended to establish a custom by which, on delivery and on indorsement of a bill of lading as between the immediate parties, and apart from the rights of third persons, the property in one man's goods passes to another against the will of both, unless there be some written instrument to control the effect of the indorsement? If the borrower in the present instance had verbally agreed with the bank that the absolute property in the goods was not to pass, but a qualified property only, can it be said that any custom of merchants overrides such an agreement? And if this is not the law, it necessarily would seem to follow that such a restrictive agreement can be implied from the nature of the transaction itself as well as from express words. Read in their widest sense, the words of the special verdict in *Lickbarrow* v. *Mason* (1) admittedly overstated the law, for the delivery to a servant or agent of a bill of lading, with the intention that he shall receive the cargo and hold it for his principal, obviously passes no property. Some qualification must be read into the terms of the special verdict, and the proper qualification seems to me to be what I have said.

It is not easy to see upon what principle there can be any magical virtue in the symbolical delivery (through the indorsed bill of lading) of goods afloat, beyond what there would be in the same delivery of goods ashore, when the question arises between the immediate parties to the agreement. Shortly after the special verdict on the second trial of *Lickbarrow* v. *Mason* (1), its meaning was considered and discussed in the Exchequer Chamber in *Haille* v. *Smith* (20). Chief Justice Eyre, in delivering the judgment of the Court, intimated that the indorsement of a bill of lading does not itself change the property, as a bargain and sale would, but is evidence only of a change, and, as between the original parties, derives its sole virtue and efficacy from the agreement between the parties. This is substantially the same law as that expressed by Mr. Justice Buller in *Hibbert* v. *Carter* (2), and it is not immaterial, as Mr. Justice Field has pointed out, to notice that *Hibbert* v. *Carter* (2) is a case cited with approval by Mr. Justice Buller himself in his subsequent judgment in *Lickbarrow* v. *Mason* (1). The mere fact that in many cases before and after *Lickbarrow* v. *Mason* (1) the transfer of a bill of lading is spoken of as passing the property, that in others it is spoken of as creating a pledge—as in *Meyerstein* v. *Barber* (3)—and that in others it is spoken of as a mortgage, causes, to my mind, therefore, no difficulty. A man may sell, or he may mortgage, or he may pledge a bill of lading by indorsing and delivering it. The question in each case, where the original parties only are concerned, is what was the bargain on the subject. In the present instance, accordingly, we have to draw the inference as to the effect of indorsement and delivery from the narrative of the particular transaction.

The cargo shipped in England was to be delivered at Poti in the Black Sea. The owner borrowed an advance from the defendants, and, as a security, deposited the bill of lading, saying that he was shortly going out to Poti to superintend the receipt and delivery of the cargo, that the amount advanced would be repaid before he left England, and that he would call again to make definite arrangements about

(20) 1 Bos. & P. 563.

it. What have we here but the simplest form of pledge, the deposit of goods as a security for a debt by which the right to the property vests in the pledgee so far as is necessary to secure the debt, the general property remaining in the pledgor. Delivery of possession is no doubt an essential element in any pledge, but it is very old law that constructive or symbolical delivery of possession is sufficient when actual possession cannot be given. "Goods at sea," says *Story on Bailments* (8th ed. p. 253), "may be passed in pledge by a transfer of the muniments of title, as by a transfer of the bill of lading, or by a written assignment thereof. So goods in a warehouse may be pledged by symbolical delivery of the key thereof;" and a bill of lading is only a key of the floating warehouse where the goods are lying.

The counsel for the appellants argued that if a pledge only was intended, no indorsement of the bill of lading was needed. This surely is a misapprehension. The pledgee of goods is entitled to sell them on default, and without the indorsement of the bill of lading the common law powers of the pledgee would be incomplete. It seems to me that the language of Lord Bramwell in *Glyn* v. *The East and West India Dock Company* (4), cited at length by Mr. Justice Field in his judgment, applies *mutatis mutandis* to this case. I feel great diffidence in dissenting from the view of so considerable an authority on the mercantile law as that of the present Master of the Rolls, and from the opinion of Lord Justice Baggallay; but, except for their contrary opinions, I should myself have thought that there had been in the present case, as between the original parties, a pledge and nothing more.

It remains to be considered whether the pledge of an indorsed bill of lading is such a passing of the property as is contemplated by the Bills of Lading Act, 18 & 19 Vict. c. 111. I may pause for a moment to observe that it was clearly the intention of those who framed that statute that the property in goods need not pass by the indorsement of the bill of lading, and that the framing of the preamble and section 1 of that Act shews that the language of the special verdict in *Lickbarrow* v. *Mason* (1) is not to be read without some qualification. But, passing from this, I think that the wording of the Act shews that the provision which we have to construe does not apply to the case of a pledge—see *Fox* v. *Nott* (21) *per* Baron Martin, as explained in *The Freedom* (15). "A" property passes no doubt by a pledge, but not "the" property, which still remains in the pledgor. Was it intended that a banker, who only acquired such a limited and special legal interest in a bill of lading as was necessary to secure his advance, should be sued for freight? The present is the first case, so far as I know, in which it has ever been suggested that he could, and I cannot help thinking that the many bills of lading pledged daily in the city of London for advances are not taken by bankers under any such idea. I believe that the true view of the law as to this matter is that expressed by Lord Bramwell in *Glyn* v. *The East and West India Dock Company* (4)—namely, that a mere pledgee cannot be sued for freight under the Act. He has not got "the" property, he has "a" property only.

For these reasons, I agree with the judgment of Mr. Justice Field, whose careful and elaborate reasoning leaves nothing really to be added, and to which I should have added nothing had it not been that I am unfortunately dissentient from the opinion of the Master of the Rolls and Lord Justice Baggallay.

In my opinion this appeal should be dismissed, with costs.

Appeal allowed.

Solicitors—Lowless & Co., for plaintiffs; Hare & Co., agents for Leach, Manchester, for defendants.

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(21) 6 Hurl. & N. 630; 30 Law J. Rep. Exch. 259.

1884. March 28, 29. } FEARON *v.* THE EARL OF AYLESFORD.

Husband and Wife—Separation Deed—Covenants, how far interdependent—Payment of Annuity—Covenant that Wife should not molest Husband—Molestation.

To an action by the wife's trustee in a separation deed against the husband for arrears of annuity covenanted to be paid by him, the defendant set up as an answer the breach of the trustee's covenant that his wife should not molest him; he further counter-claimed damages for molestation by her. The wife had been living during the separation in adultery, and had given birth to a child of which the defendant was not the father, and there was some evidence that she represented it as being defendant's son and heir. Held (*by* DENMAN, J., *and* MANISTY, J.), *that in the absence of any express provision in the deed making the performance of the covenant by the wife and her trustee a condition precedent to the payment of the annuity, the covenants were independent, and molestation by the wife afforded no answer to the action for the arrears of the annuity.* Held *further, that the fact of the wife living in adultery, even coupled with that of her having given birth to a bastard child, did not constitute molestation.*

Per DENMAN, J.; *dubitante* MANISTY, J.—*If the wife caused the child to be called by her husband's name and second title, and held it out as being the defendant's son and heir, this, being obviously calculated to cause the defendant personal annoyance, might amount to molestation.*

This was an action by the plaintiff, as trustee for the defendant's wife under a deed of separation, to recover 475*l.*, arrears of an annuity which the defendant had covenanted in the deed to pay to the trustee for his wife. The defence raised on the pleadings was, that there was a further covenant in the deed by the trustee that the wife should not molest the plaintiff, her husband, at any time after making the deed, and that after making it, and before any breach on the defendant's part in non-payment of the annuity, she had molested the defendant. There was also a counter-claim for damages occasioned to the defendant by such molestation.

The action was tried before Day, J., and a special jury at the Hilary Sittings, 1884, when the learned Judge asked the jury whether there had in fact been a breach of the covenant against molestation, to which they replied yes. They also assessed the damages on the counter-claim at 100*l.* After argument as to the effect of these findings, on further consideration the learned Judge held that the molestation afforded an answer to the plaintiff's claim because the two covenants were interdependent. He therefore gave judgment for the defendant on the claim and also on the counter-claim, but without damages.

The plaintiff gave notice of motion for an order for a new trial on the ground that there was no evidence of molestation, and also to set aside the judgment and enter it, under Order XL. rule 5, for the plaintiff on the claim and counter-claim.

The separation deed was made between the Earl of Aylesford the defendant, the Countess of Aylesford his wife, and a Mr. Williams the trustee, on the 22nd of May, 1877, and it recited that unhappy differences had arisen between Lord Aylesford and his wife, and that they had consequently lived separate for some time, and had agreed to continue to do so, and that such arrangements should be entered into as were thereinafter contained. It was then witnessed that, in pursuance of the said agreement and for effectuating the said arrangements, and in consideration of the covenants of the trustee thereinafter contained, the defendant did thereby covenant with the trustee that notwithstanding her coverture his wife might at all times during the defendant's life live separate from him and free from his control and authority as if she were unmarried, and that he would not compel her to cohabit with him or in any manner molest or interfere with her in her way of living; and, further, that he would during the joint lives of himself and his wife pay to the trustee in trust for the wife an annuity of 500*l.*, by equal half-yearly payments in February and August in each year. It was then further witnessed that, in further pursuance of the said agreement, and for

further effectuating the said arrangements, and in consideration of the provisions thereinbefore contained, the trustee did thereby covenant that the wife should not at any time thereafter molest the defendant, and should not in any manner compel or endeavour to compel him to cohabit with her; and, further, that the trustee would at all times thereafter keep indemnified the defendant against all the debts and liabilities which his wife had already contracted or should thereafter contract, and against all actions in respect of such debts and liabilities.

It was admitted on the trial that the defendant had not paid the annuity; but he alleged a breach of the covenant against molestation on the part of the wife, and that he was thereby discharged from his covenant to pay the annuity.

The evidence shewed conclusively that, after the execution of the deed, and while the defendant and his wife were living apart, she was living in adultery, and had borne a son of whom the defendant was not the father. There was evidence also that this child was called Lord Guernsey in the house where it lived with its mother; it was alleged that it was so called by her, and that by the use of this name, which is the courtesy title borne by the eldest son of the Earl of Aylesford, she had held it out as being the son and heir of her husband. This was put forward as molestation.

Finlay, Q.C., and *R. O. B. Lane*, for the plaintiff.—There was no molestation here within the meaning of the deed. It is clear that adultery alone is not molestation, and cannot absolve the defendant from the obligation of his covenant—*Baynon* v. *Batley* (1) and *Gandy* v. *Gandy* (2). Then the fact of a child being born of adulterous intercourse does not constitute molestation. The object of the deed being that the parties should live separate, mere conduct on the part of the wife which is annoying to the husband will not amount to molestation. Some personal act of the wife against her husband is intended. What is alleged as to the child being called Lord Guernsey is not brought home to Lady Aylesford as her act; and, if it were so, that would not be molestation. Again, even if molestation were established, it would not amount to a defence to the action—the covenants are independent of one another, and either party is at liberty to sue the other for the breach of any covenant binding on that other, without being himself freed from obligation. The deed cannot be avoided by a single breach of covenant—*Charlesworth* v. *Holt* (3) and *Thomas* v. *Everard* (4).

Waddy, Q.C., and *F. Turner*, for the defendant.—These covenants are so dependent on one another that a breach of any one must avoid the deed. Molestation is the important matter against which the defendant was to be protected, and the payment of the annuity was promised on that consideration. No damages can compensate, and the wife personally cannot be sued if she molest, so the only mode by which the defendant can protect himself is through the trustee by stopping the annuity. *Gandy* v. *Gandy* (2) is in the defendant's favour.

[DENMAN, J., referred to *Grant* v. *Budd* (5).]

The cases shew that these covenants will be treated as interdependent, so as to make them equally binding on both parties—*Crouch* v. *Waller* (6), *Seagrave* v. *Seagrave* (7), *Hunt* v. *Hunt* (8), *Roberts* v. *Brett* (9) and *In re Besant* (10). Then, whether molestation be an answer to the action or only a ground of counter-claim, there was ample evidence here to shew that the wife did molest her husband. The word will not be construed in the restricted and narrow sense contended for by the plaintiff. It was intended to cover anything which, done by the wife, could fairly be regarded as necessarily annoying

(1) 8 Bing. 256.
(2) 51 Law J. Rep. P., D. & A. 41; Law Rep. 7 P.D. 168.
(3) 43 Law J. Rep. Exch. 25; Law Rep. 9 Exch. 38.
(4) 6 Hurl. & N. 448; 30 Law J. Rep. Exch. 214.
(5) 30 Law Times, N.S. 319.
(6) 4 De Gex & J. 302; 28 Law J. Rep. Chanc. 514.
(7) 13 Ves. 439.
(8) 31 Law J. Rep. Chanc. 101.
(9) 34 Law J. Rep. C.P. 241.
(10) 48 Law J. Rep. Chanc. 497; Law Rep. 12 Ch. D. 605.

and prejudicing the husband. The birth of a child under these circumstances, while she was living in adultery, was a scandal, and, by reason of the legal presumption of its being her husband's child and heir to his title and estates, would necessarily affect him injuriously and constitute molestation. Then the putting forward the child as Lord Guernsey could only be intended to annoy the husband and to molest him.

Finlay, Q.C., in reply.—The judgment of Lord Bramwell in *Charlesworth* v. *Holt*, on p. 28 of 43 Law J. Rep. Exch., puts the argument as to the covenants exactly. Here the parties have not put into the deed anything to shew that the performance of one covenant would be a condition precedent to the performance of another by the other party.

DENMAN, J.—This is a case of some difficulty, and certainly of novelty. It is an action by the trustee of a separation deed, dated the 22nd of May, 1877, to recover certain arrears of the annuity, and there is no dispute as to the fact that—subject to there being any defence capable of being raised—475*l.* would be due to the plaintiff under the deed. The plaintiff was the successor of Mr. Williams, the original trustee on behalf of Lady Aylesford, who was actually living separate from her husband at the time the deed was executed.

The deed recited that differences had occurred, that the parties were living separate, and that an agreement had been come to that they should continue to live separate. In pursuance of this agreement and the covenants contained in the deed, the Earl of Aylesford covenanted that his wife might live separate from him, and that he would not compel her to cohabit with him, nor would molest her. Thus shewing as great a determination as possible to keep apart from one another, and that she would be left to follow her own devices. For further effectuating the arrangement, he covenanted during their joint lives to pay her an annuity of 500*l.*, the days of payment being fixed, and the money being payable to the trustee in trust for her separate use. He then further covenanted with the trustee to let her hold property for her separate use; and then Williams, the trustee, covenants on his part for her that she should not at any time thereafter molest the earl or seek to compel him to cohabit with her. The trustee indemnified him against all debts of hers. This is the whole deed. So its main object was that the parties should live separate, and that he should not be molested. At the same time there is a question on the face of the deed to be construed by the Court, and it is this: are the covenants in the deed covenants which are so absolutely dependent on one another as that on default of performance of any one by one party, that party should be wholly incapable of suing on the deed or of taking any benefit under it? Are the covenants so interdependent as that the performance of the one is the consideration for the other?

The early parts of the deed do not help much towards the construction of the rest. The words "in pursuance of the agreement and for effectuating the arrangement" are not conclusive; they seem rather as if one party covenanted in consideration of the other covenanting. But, looking at the words of the covenants themselves actually relied upon on the one side and on the other, we find the covenant by the earl is, "during the joint lives to pay, or cause to be paid, annually to the trustee at certain dates 500*l.*" Now there is nothing to limit it to any contingency outside the words themselves. The covenant, however, relied on on the other side is that Williams covenants for himself, his executors and administrators, that the said countess shall not at any time hereafter molest the earl or compel him to cohabit with her. Again, there is nothing to restrict that covenant to any contingency. It is absolute—to prevent molestation, and to keep the earl indemnified against her debts.

On the facts proved before the Judge at the trial and found by the jury, he held that a good defence had been established.

Let us see what it was. As to evidence of molestation two sorts were relied on. First, after the separation, and while it was being continued under this deed, and at a time when the earl could not be the father, a child was born to his wife, who was

living in adultery with some other person. This was undisputed, and Mr. Waddy, for the defendant, admits that it has been held that the mere committing of adultery would not constitute molestation, or be a defence to an action under this deed; and it is enough to say that I am clearly of opinion that this is so, after the cases which have been cited. Adultery, therefore, is not molestation. But Mr. Waddy says, adultery followed by the birth of a child is molestation. In my opinion, however, it is absolutely impossible so to regard it. Can it be said that if the consequence of adultery is the birth of a child, that which was not molestation previously then becomes so? Molestation seems to be an act, and the birth of a child is not the act of the woman in that sense. There is therefore no molestation so far.

Then it was said that there was molestation, because the evidence shewed that Lady Aylesford held out the child, which could not be Lord Aylesford's lawful heir, to the world as Lord Guernsey—calling it by the second title of the earldom. The Judge left that to the jury for them to say whether it was an act of molestation. Now I am not prepared to say, if it could be affirmatively proved that Lady Aylesford did insist on the child being called Lord Guernsey, that it might not be evidence of conduct on her part so likely to be annoying to Lord Aylesford as to amount to molestation. I think that the word is not to be so narrowly construed as to exclude such a manifestly annoying act as that of parading the child as her husband's son and heir. I am, however, not free from doubt as to whether there was sufficient evidence in the case for the jury of the alleged fact of Lady Aylesford holding out the child as Lord Guernsey. On the whole, I think the evidence which shews that the child was called Lord Guernsey by people in the house, is evidence from which the jury might infer that it was so called with the authority of the mother; and if she so authorised or allowed this to be done, I think it was molestation.

Then comes the more important question. If this was molestation by Lady Aylesford, does the fact afford an answer to the action for the arrears of the annuity? Here I think we are bound by authority. The cases of *Charlesworth* v. *Holt* (3) and *Grant* v. *Budd* (5) seem to me to establish the following proposition: Where there are two covenants in an ordinary separation deed, one of which is by the husband that an annuity shall be paid, and the other by the wife that she will not molest him, each of such covenants is independent of the other, and either party may sue for a breach.

Of course there may be instances where something has been done absolutely inconsistent with the object of the whole deed—namely, with the separation of the parties—and in such cases different considerations might arise; but on the construction of these covenants I think they are independent, and that the plaintiff is entitled to recover from the defendant the annuity which he covenanted to pay, even though the plaintiff's own covenant as to molestation may have been broken.

One of the chief arguments put forward by Mr. Waddy was that it was impossible to measure pecuniarily the damages for molestation, and therefore the construction which made the cessation of the annuity coincide with and be the consequence of the act of molestation was the sound one.

But I do not see that a jury would have any difficulty in measuring the damages in such a case; they do so continually in an action for breach of promise of marriage, and in other cases where the feelings are involved or annoyance occasioned. In the very case before us the jury have, in fact, assessed the damages to Lord Aylesford for molestation at 100*l.*, and no doubt they have done so having regard to the circumstances under which the deed was drawn up, and to the deed itself, which shews that what Lord Aylesford wanted was to keep Lady Aylesford and himself apart, so that each should be free to do as he or she liked. The jury have said that such was their view; they thought that Lady Aylesford should have the annuity, if there was no defence to the action, and that Lord Aylesford should have 100*l.* for the molestation.

The learned Judge, however, who tried the case took the view that the covenants were interdependent, and thereupon decided that there was a complete defence to the

action, and gave no effect to the finding of the jury as to the damages, entering judgment for the defendant. I think, for the above reasons, that this was not right, and that on the findings judgment should be entered differently. We do not wish to send the case for a new trial, and, having the facts all before us, think it best to give judgment for the plaintiff for 475*l.* on the claim, and for the defendant for 100*l.*, the damages awarded him in respect of the molestation.

MANISTY, J.—This is, no doubt, a somewhat peculiar case, and I am sorry to say that I am not at present prepared to agree in all respects with either of my learned brothers.

The first question that arises is whether, upon the true construction of the deed of separation, the covenants by the husband and the trustee for the wife respectively are dependent or independent covenants. So far as its terms are concerned, the covenant sued upon by the plaintiff is an absolute independent covenant. If it had been the intention of the parties that the covenant should be subject to the condition that the husband should only be liable to pay the annuity so long as the wife did not molest him, it would be easy to say so. Similar provisions are familiar to us. It is a common limitation that the liability to pay shall only continue while the wife continues to lead a chaste life.

So here it would have been easy to provide that the annuity should only continue payable so long as there was no molestation by the wife. Such a provision might be made either by way of limitation or by way of proviso to the covenant. The contention must be that we ought to read such a limitation or proviso into the covenant. But one great principle or canon of construction is that words which are not in an instrument ought not to be imported into it unless the implication is a necessary one. On what principle are we to imply such a limitation or proviso in the present case?

In the case of *Grant* v. *Budd* (5), to which my brother Denman has referred, Lord (then Mr. Justice) Blackburn said: "There is on the face of the deed an express covenant to pay the sum of 1*l.* a week during the life of the wife. If it was intended that the payment of this sum should cease upon the determination of the relationship of husband and wife, it would have been easy to insert this condition in the deed; but by the decision of the Court of Exchequer" (of which his Lordship approved) "this condition must not be implied, but put in express words." It seems to me that the same reasoning is applicable to the present case.

It was argued that non-molestation of any kind was a condition precedent, on the ground that molestation went to the whole consideration for the husband's covenant; but clearly that is not so. The covenant of the wife's trustee to indemnify the husband against debts contracted by the wife is a material part of the consideration—see the authorities collected in *Lush's Law of Husband and Wife*, tit. "Deeds of Separation." The primary object of the parties was that they should live separate. "Molestation" is a very wide and general term, and is not confined to such molestation, if any, as might go to the root of the contract. It appears to me that the words of the deed express very clearly what was the real intention of the parties—namely, that the husband and wife should live separate and apart from each other; that the wife should go and live when and how she pleased, so long as she did not live, or seek to live, with her husband; and that the husband should make her an annual allowance of 500*l.* for her support, he having the covenant of some responsible person as a security against any molestation by her, and an indemnity against any liability for her debts. It was urged that the wife might again and again molest the husband. It is not necessary to decide the point; but I am very much inclined to think that, giving effect to what is really the substance of the covenant—namely, that the wife, through the medium of her trustee, covenants not to molest her husband—an injunction might be obtained against her if she was guilty of continuing molestation within the meaning of the deed. However this may be, I am clearly of opinion that the mere breach of the covenant not to molest does not avoid the deed. That being so, I cannot

agree with the judgment of my brother Day; and, though I feel the highest respect for his opinion, I must act upon my own view of the case. I think that judgment must be entered for the plaintiff on the claim for the amount of the arrears of the annuity.

I now come to that part of the case as to which I cannot altogether agree with my brother Denman—namely, the counter-claim. It is admitted that adultery by itself would not be molestation within the meaning of the deed; but it is said that adultery followed by the birth of a child is such molestation. My brother Denman has sufficiently answered the argument. The birth of the child is involved in the act of adultery, and is a mere consequence of it. It seems to me a most extraordinary and untenable proposition that the ultimate result of the act, according as a child may be born or not, should determine whether it is an act of molestation or not. Upon this part of the case I agree with my brother Denman. But then it is said that there was molestation in that the wife held out the child born in adultery as the child of her husband born in lawful wedlock. I doubt whether that, if proved, would constitute molestation within the meaning of the deed; but it is unnecessary to decide the point, because I am of opinion that, having regard to the only evidence which was admissible against the wife [this the learned Judge discussed], there was no evidence on which the jury could reasonably find that the wife did hold out the child to be the child of her husband. Unfortunately there is a difference of opinion between my brother Denman and myself on this point; consequently my judgment upon that part of the case will be withdrawn, and the result is that judgment will be entered for the plaintiff on the claim for the arrears of the annuity, and for the defendant for 100*l.* on the counter-claim.

Judgment accordingly.

Solicitors—J. H. Lee, for plaintiff; G. E. Kaye & Co., for defendant.

1884. May 21. } LIMPUS AND ANOTHER v. ARNOLD.

Will, Construction of—Loan by Testator to Son in Lifetime—Advances by Testator to be taken in Satisfaction of Share—Advancement—Hotchpot.

A testator bequeathed the whole of his personalty to trustees, with a direction that his widow should receive the net annual income thereof, and, subject to the preceding direction, the trustees were to hold the trust property for the absolute use of all his children equally. Then followed this proviso:—"I declare that any advances made by me to any child in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child in my private memorandum-book, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property."

One of the sons had had a loan of 2,500*l.* *from his father, for which he gave a promissory note, and on which, or on so much of it as had not been repaid, he paid interest during his father's lifetime. At his father's death, leaving the widow surviving, the amount shewn by the memorandum-book to be outstanding against this son was* 2,000*l.*:—

Held, *that the widow was entitled to receive during her life, as part of the annual income given her by the will, interest on the* 2,000*l.*, *and that the son was not entitled to treat the debt as gone or the amount as converted into a gift at the date of the testator's death, but must wait till the death of the widow, when the proviso as to the division of the shares under the will would take effect.*

This was a Special Case stated for the opinion of the Court on the construction of the will of Robert Arnold.

1. The plaintiffs are the executors of the will of Jane Arnold, widow of Robert Arnold, and their claim is for 293*l.*, being interest at five per cent. from the date of the death of Robert Arnold to that of Jane Arnold on a sum of 2,000*l.*, which, prior to the death of Robert Arnold, had been advanced by him to his son the defendant, and the point in dispute is whether Jane

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Arnold was during her life entitled under the will of Robert Arnold to interest on the said sum.

3. On the 1st of January, 1862, the defendant was indebted to his father in 2,500*l.*, which was then secured by a promissory note payable on demand, with five per cent. interest per annum. This sum was reduced by payments as shewn by a memorandum-book kept by the testator in which he made entries relating to his rents and to advances made by him to the defendant and others. The entries in the book are correct, and the sum due to the testator at his death by the defendant for principal was 2,000*l.*, and by Henry Jackson, a son-in-law, 1,140*l.*, this being likewise secured by a promissory note.

4. Robert Arnold died on the 2nd of December, 1879, having duly made his will dated the 20th of December, 1873. The will was duly proved. Copy annexed to the Case.

5. Jane Arnold survived him and received the income of the testator's estate other than the said 2,000*l.*, but she was not paid any interest on the 2,000*l.* She once claimed of the defendant such interest, but the defendant contended that he was not liable to pay interest after the date of his father's death, and she made no further application. By her will dated the 22nd of March, 1882, she gave to the plaintiffs the residue of her personal estate, "including any sum or sums of money or interest due and remaining unpaid at my decease from Robert William Arnold (the defendant) and Henry Jackson, under the will of my late husband."

6. Jane Arnold died on the 4th of December, 1882, and the plaintiffs duly proved her will.

The will of Robert Arnold, annexed to the Case, contained the following clauses:—

"I devise all my real estate, and I bequeath all the residue of my personal estate, and which is hereinafter comprised under the denomination of my trust property," unto certain trustees, "upon trust to dispose thereof according to the directions hereinafter contained, that is to say, . . . I direct that my trustees shall permit my wife, she continuing my widow, to receive from my death the net annual income actually produced by my trust property, howsoever constituted or invested. . . . I direct that, subject to the preceding directions, my trustees shall hold my trust property for the absolute use of my child if only one, or all my children equally if more than one. . . . Provided always, and I declare that any advances made by me to any child or to the husband of any child in my lifetime, together with interest on such advances from the time of making thereof as charged against such child or her husband in my private memorandum-book in my own handwriting, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property unless I shall otherwise declare by writing under my hand."

The promissory note given by the defendant, dated the 1st of January, 1862, was as follows:—

"On demand I promise to pay Mr. Robert Arnold, his executors or assigns, 2,500*l.*, with five per cent. interest per annum value received.

"Robert William Arnold."

The memorandum-book shewed interest paid by the defendant up to the end of 1878, and contained this entry:—"This is the memorandum-book named in my will as containing the advances made by me to my children or their husbands, to be taken in satisfaction of their respective share in my estate.—R.A."

The question for the opinion of the Court is whether, on the true construction of the will of Robert Arnold, Jane Arnold was entitled to receive during her life, as part of the annual income given to her by his said will, interest on the said sum of 2,000*l.*, or whether interest on the said sum ceased to be payable by the defendant on the death of his father.

A. M. Channell, for the plaintiffs.—There is no intention shewn here to release the debt; it therefore was a debt to the estate during the lifetime of the widow. There being plenty of personalty the testator did not intend that the loan should be called in, but the interest on it was to continue payable as during his lifetime. The testator did not give the debt to his son until the widow's death. The form of promissory note is to pay Arnold, his executors or assigns.

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H. D. Warr, for the defendant.—The testator declares this loan to be an advance: that being so, it is, according to equity, an advance which is in the nature of a gift—*Meinertzhagen* v. *Walters* (1) and *Stewart* v. *Stewart* (2). The hotchpot clause merely reserved an option to the son so advanced to throw his advance in and share with the others on the final distribution at the widow's death: It is submitted that the executors could not have sued either for principal or interest—*Gilbert* v. *Wetherall* (3).

[MATHEW, J.—In that case the debt was released.]

So it was here in so far as it ceased to be a debt to the estate and became a gift to the son.

[STEPHEN, J.—It is noticeable that part of the loan had been repaid, and interest was paid on the balance.]

The sums are described as advances in the memorandum-book to which the testator refers. As soon as they were earmarked as advances, the executor could never treat them as debts. They were never part of the residue. The son took an interest from the date of the father's death—*Auster* v. *Powell* (4).

Channell, in reply.—The cases referred to deal with the question how to divide the estate, not when; and the whole point here is, at what time did that which was a debt become a gift? It is submitted that the widow's death is the date. The intention of the testator was that this which formed part of his income should be part of his widow's income also.

STEPHEN, J.—We have given the best consideration we can to this case, and for myself I will say that there is hardly anything on which I give judgment with less satisfaction than the meaning of a will: the reason being that one has to decide upon a point which very likely was not present distinctly to the testator's mind, and consequently what he has said may or may not shew his intention upon the particular point raised. Two views are put forward here, each said to be in accordance with the testator's words and intentions.

The general scope of the will was that the whole personalty should be in trust, the income going to the wife for life, and after her death the principal being divided among the children absolutely. Afterwards comes what has been spoken of in argument as the hotchpot clause. It is said on the part of the plaintiffs that during the widow's lifetime the money which had been lent by the father to the son remained due from the son to the estate, although it was not the intention of the testator that it should be actually repaid; and that the interest upon it was payable, and was to be part of the trust estate, and, as such, paid to the widow as tenant for life. Then that afterwards, on her death, a general division would take place, and the hotchpot clause would come into effect, under which the child who had had the advance might either take the amount so outstanding in full satisfaction of his legacy, or might bring it into account and then share with the others in the proportions specified by the testator's will. In support of this view it was said that there is no indication in the will that the testator did not so intend, that this advance was a debt due to the personal estate, and that the widow was to enjoy the income from the whole of the personal estate during her life; moreover, if a son having had an advance were to be excused the payment of interest thereon from his father's death, the effect would be to prefer him so far to the other children who had had no advances.

The defendant, on the other hand, says that the effect of the will is that the debt to the father, as it had been, became on the death of the father changed into an "advance," technically so called, and that the son so "advanced" became absolute proprietor of the sum in question and was entitled to keep it until the death of the widow, when he had the option of either keeping it permanently and accepting it in full satisfaction of his interest under the will, or of throwing it into hotchpot and then claiming to be paid out of the estate his share rateably with the other legatees.

(1) 41 Law J. Rep. Chanc. 801; Law Rep. 7 Chanc. App. 670.
(2) 49 Law J. Rep. Chanc. 763; Law Rep. 15 Ch. D. 539.
(3) 2 Sim. & S 254.
(4) 1 De Gex, J. & S. 99.

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Cases were cited in support of these two contentions. Now I always think that cases are only a guide in wills where the words to be construed are very similar, as it is always necessary to look at the whole scope of the will to construe an ambiguous clause. So, to my mind, here the crucial question is whether the clause relating to advances made to a son is meant to come into effect at the death of the husband or of the wife. I think the object of the testator was to produce equality among the children, and so that the period was the death of the wife. It was intended by the testator that his income, as it was at the time of his death, should continue payable to his widow till her death, and that then, and not till then, was the principal to be appropriated and divided. I therefore think that the defendant here ought to have paid interest on the advance he had had, during his mother's lifetime, and so I answer the question asked us in favour of the plaintiffs.

MATHEW, J.—I am of the same opinion. In reference to wills it is often desirable to consider the language used by a testator, and see whether it is his own or not. Frequently it will be found to be professional language, and looking at this will it is clear that a person with a knowledge of conveyancing language wrote it. What is the argument which the defendant puts forward, founded on the wording of the devise? He says, "I at my father's death, having been previously indebted to him in 2,000*l.*, was released from such debt; and anybody reading the will ought so to understand it." If he is right, the effect would be that the defendant at his father's death would have 2,000*l.* in possession, and would thenceforward receive the interest on that sum for his own. Is there any similar provision for the other children which would give them a benefit taking effect immediately on the father's death, or would this clause so construed anticipate for the defendant, and for him alone, the benefits of his father's legacy.

Now the testator's direction is that his widow should receive the annual income produced by his trust property during her life, and that looks certainly as if it was intended that she was to be in the same position while she lived as he had been. Then it is provided, "Subject to the preceding directions, my trustees shall hold my trust property for the absolute use of all my children equally." This seems to me to be a clear indication of intention that all his children should benefit equally, and I should so hold unless there is anything to shew a contrary intention. Mr. Warr refers to the hotchpot clause which says, "any advance made by me to any child in my lifetime shall be taken in full or in part satisfaction of his share in my trust property." It appears, however, to me that the testator meant to say, "subject to my widow's interest, the property shall be distributed equally, deducting at the time of ultimate distribution in the case of any child the money which he or she has already had." I think, therefore, that judgment should be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors—E. & F. Bannister, for plaintiffs; Park, Nelson, Morgan & Gemmett, agents for Footner & Son, Romsey, for defendant.

BANKRUPTCY. CAVE, J. 1884. June 11.

In re WILLIAM AND JOHN LUDFORD. OFFICIAL RECEIVER (*appellant*) *v.* THE SHERIFF OF WARWICKSHIRE (*respondent*).

Sheriff — Execution — Notice of Receiving Order before Sale—"Costs of Execution"—"Poundage"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 46.

The "costs of execution" mentioned in section 46, *sub-section* 1, *of the Bankruptcy Act*, 1883, *do not include the sheriff's "poundage":—*

Semble,—*"Poundage" is included in the "costs of execution" mentioned in sub-section* 2 *of the same section.*

Special Case stated for the opinion of the High Court pursuant to the Bankruptcy Act, 1883, s. 97, by the Judge of the County Court of Warwickshire holden at Birmingham.

On the 16th of January, 1884, a writ

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of *fieri facias* was lodged by a judgment creditor with the Sheriff of Warwickshire, whereby the sheriff was directed to levy on the goods and chattels of the judgment debtors, William and John Ludford, the sum of 138*l.* 18*s.* and interest, and 2*l.* 2*s.* 8*d.* for costs.

On the 17th of January, 1884, the sheriff levied on goods, consisting of household furniture, tools and stock-in-trade at two places, and remained in possession till the 21st of January, 1884.

On or about the 20th of January, 1884, the judgment debtors filed a petition in bankruptcy, and on the 21st of January a receiving order was made against the judgment debtors, and notice thereof on the same day was served on the sheriff, who delivered to the official receiver the goods and chattels taken in execution.

The goods seized, after allowing to the bankrupts articles to the value of 20*l.*, as provided by the Bankruptcy Act, 1883, s. 44, realised the sum of 72*l.* 9*s.* 11*d.*

The sheriff claimed, under the Bankruptcy Act, 1883, s. 46, sub-s. 1, to be entitled to the following costs of execution —namely,

Levy fee	£1	1	0
Mileage	0	18	0
Possession money (2 men 6 days) . .	3	0	0
Poundage	4	12	5

The official receiver disputed the claim of the sheriff to poundage, but admitted the validity of the remaining charges.

The question for the opinion of the Court was whether, under the circumstances stated, the sheriff was entitled to poundage.

Chalmers, for the official receiver.—The sheriff is not entitled to poundage unless the execution is made fruitful to the execution creditor—*Mortimore* v. *Cragg* (1), *In re Craycroft; ex parte Browning* (2), *The King* v. *Robinson* (3) and *Miles* v. *Harris* (4).

Wills, Q.C., and *Macaskie*, for the sheriff.

(1) 47 Law J. Rep. C.P. 348; Law Rep. 3 C.P. D. 216.
(2) 47 Law J. Rep. Bankr. 96; Law Rep. 8 Ch. D. 596.
(3) 2 Cr. M. & R. 331; 1 Law J. Rep. Exch. 319.
(4) 12 Com. B. Rep. N.S. 550; 31 Law J. Rep. C.P. 361.

—The sheriff's right to poundage is derived from 28 Eliz. c. 4. By 7 Will. 4 and 1 Vict. c. 55, the amount of the sheriff's fees on execution is regulated by the tables of fees allowed by the Masters; but these fees are the fees of the sheriff's officer, and unless the sheriff gets poundage he will receive nothing.

[CAVE, J.—Why should the sheriff be in a better position here than if the judgment were set aside?—*Miles* v. *Harris* (4).]

The present Act meant to benefit the sheriff. Section 46, sub-section 2, gives him poundage. "Costs of execution" mean more than "expenses."

[CAVE, J.—What is the poundage to be calculated upon?]

Here the goods were afterwards sold—"*Id certum est quod certum reddi potest.*" *Miles* v. *Harris* (4) proceeded upon a misreading of 28 Eliz. c. 4, and is inconsistent with *Rawstorne* v. *Wilkinson* (5). *Armitage* v. *Jessop* (6) and *In re The Perkins Beach Lead Mining Company* (7) were referred to.

CAVE, J.—I am of opinion that the contention of the official receiver must prevail.

The general proposition of law is undoubted, that the sheriff is only entitled to poundage when he has obtained money by compulsion from the judgment debtor, either by reason of the debtor paying to prevent a sale, or by an actual sale; the sheriff must have the money in his hands ready to hand over to the execution creditor. No case can be found to shew that until the sheriff is in a position to hand over the money he is entitled to poundage. *Miles* v. *Harris* (1) is to the contrary, and is quite consistent with the case of *Rawstorne* v. *Wilkinson* (5), because there the sheriff had the money ready to deliver to the execution creditor. That being the general rule, I find that the Act says, by section 46, sub-section 1: "Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official

(5) 4 M. & S. 256.
(6) 36 Law J. Rep. C.P. 63; Law Rep. 2 C.P. 12.
(7) Law Rep. 7 Ch. D. 371.

In re Ludford, Bankr.

receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." Now, what are the "costs of the execution"? I apprehend that the expression must be governed by the general rule which I have stated, and that consequently, where notice is served on the sheriff before sale, and there never is a sale by the sheriff, and the sheriff never has money in his hands ready to be delivered to the execution creditor, the sheriff cannot get his poundage. On the other hand, under sub-section 2 of the section, the sheriff will get his poundage. It is said that the Act meant to improve the position of the sheriff; but that is answered by holding that he is entitled to his poundage under sub-section 2. Where, looking to the general principle, the sheriff ought to have his poundage he gets it under the Act; where he does not get it under the general principle, neither does he get it under the Act. There is also this good reason for the distinction—namely, that in the one case, where the goods are sold, there is no difficulty in ascertaining the amount of the poundage; but where the goods are not sold, there may be great difficulty.

I have no doubt, therefore, that under sub-section 1 the sheriff is not, and under sub-section 2 he is, entitled to poundage.

Chalmers stated that, as this was a test case, the official receiver did not ask for costs against the sheriff.

CAVE, J.—Then each party bears his own costs, the costs of the official receiver to be taken out of the estate.

Solicitors—Solicitor to the Board of Trade, for the official receiver; Taylor, Hoare, Taylor & Box, for the sheriff.

1884. May 19. THE DIRECT SPANISH TELEGRAPH COMPANY (LIMITED) *v.* SHEPHERD.

Landlord and Tenant — Covenant by Landlord to pay "all Rates and Taxes"— Water Rates — Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *ss.* 3 *and* 72.

A covenant by the landlord to pay "all rates and taxes chargeable in respect of the premises" includes the payment of water rates.

Appeal from the decision of the Judge of the City of London Court, in an action by the lessees for twenty-one years of a shop and basement in Leadenhall Buildings, in the city of London, against the lessor for breach of a covenant in the lease that the lessor would pay all rates and taxes.

By an agreement dated the 1st of August, 1882, made between the plaintiffs and the defendant, it was agreed that the lease should contain, among other covenants, "a covenant by the lessor to pay all rates and taxes chargeable in respect of the premises."

By the lease dated the 17th of October, 1883, the defendant covenanted, among other things, that "(*a*) the lessor will, during the said term, pay all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees within the rooms hereby demised; and (*b*) will keep the water-closet, lavatory and other conveniences in good order and condition."

The defendant delivered an equitable defence, in which he claimed to have the covenant in the lease rectified so as to exactly correspond with the covenant to pay rates and taxes in the agreement, on the ground that the covenant in the lease was inserted by a common mistake.

It was alleged that, in preparing the lease, the form appropriate to the offices over the shops in the building had been used by mistake for the form appropriate to the shops.

The plaintiffs paid the water rate of 5*l.* to the New River Company to prevent the supply being cut off. The jury found a verdict for the plaintiffs for 5*l.*; but the Judge reformed the lease so as to bring it into conformity with the agreement, and

entered judgment for the defendant, holding that the water rate was not included in the words "all rates and taxes." He gave the plaintiffs leave to appeal on that question.

W. Graham (*Russell Spratt* with him), for the plaintiffs, referred to 10 Vict. c. 17. s. 3, the Waterworks Clauses Act, 1847 (interpretation clause).

Upjohn, for the defendant, was called upon.—A water rate is not a rate. It is a payment for goods sold and delivered. The occupier of the house is not bound to take the water; if he does, he pays for it according to the annual value of the house by an implied agreement incorporating the special Act. The rate is not chargeable in respect of the house, and cannot be distrained for.

He cited *The Sheffield Waterworks Company* v. *Bennett* (1).

Graham, in reply.

HAWKINS, J.—I am of opinion that this appeal must be allowed and the judgment entered for the plaintiffs. The whole question is, whether the water rate is within the covenant or the agreement. So far as the present question is concerned, the only difference between the covenant and the agreement is that the agreement makes the lessor liable to pay all rates and taxes "chargeable," while the covenant makes him liable for all rates and taxes "payable," in respect of the premises. The two words have substantially the same meaning. The appellants seek to recover the water rate which they have paid from their landlord. It is said that the landlord is not liable, because the water rate is not chargeable in respect of the premises. The Waterworks Clauses Act was passed in 1847, and this lease was made in 1883. By the interpretation clause of that Act, "the expression 'water rate' shall include any rent, reward or payment to be made to the undertakers for a supply of water." Rates are chargeable "in respect of" the premises, because they are made on the annual value. It is not necessary to shew that the rates are chargeable on the premises, as they are chargeable in respect of them, even though there is no right to distrain. The 72nd section of the Act throws light on the matter, because it makes the owners of houses not exceeding 10*l.* in annual value liable for the water rate. In this case the landlord and tenant have only done by agreement what would have been done for them in the case of a smaller tenement.

SMITH, J.—I am of the same opinion. The water rates are said not to be a rate, but a payment for goods sold and delivered; but it is impossible so to hold. By the covenant the lessor is to pay "all rates and taxes payable in respect of the demised premises," and this covenant ought to have been framed according to the agreement, so as to be a covenant "to pay all rates and taxes chargeable on the premises." Instead of enumerating all the numerous rates and taxes which are chargeable on the premises, it puts them together as "all rates and taxes." It can make no difference whether they are specified individually or generally.

Judgment for the plaintiffs; leave to appeal refused.

Solicitors—Blunt, Tebbs & Lawford, for plaintiffs; Moon & Gilks, for defendant.

(1) 42 Law J. Rep. Exch. 121; Law Rep. 8 Exch. 196.

[IN THE COURT OF APPEAL.]

1884. May 9. THE GUARDIANS OF HEADINGTON UNION, OXFORD (*appellants*) *v.* THE GUARDIANS OF ST. OLAVE'S UNION, SURREY (*respondents*).

Poor—Order of Removal—Children Deserted by Widowed Mother—Derivative Settlement—Birth Settlement of Children—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 35.

[For the report of the above case, see 53 Law J. Rep. M.C. 91.]

1884. March 5. } DAVIES v. USHER.

Bill of Sale—Consideration—Advance of 30l., with Immediate Repayment of 15l.—Bills of Sale (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 12.

The plaintiff applied to the defendant for a loan of 15*l.*, *offering as security a bill of sale on his furniture. The defendant pointed out that by section* 12 *of the Bills of Sale Act*, 1882, *the bill of sale would be void if given for a consideration under* 30*l.*, *and proposed to lend that amount, with a stipulation that* 15*l. should be repaid on demand and* 15*l. by instalments. The plaintiff agreed to the terms of the loan, and, on the execution of a bill of sale in accordance therewith, received the sum of* 30*l. Immediately after the plaintiff had received the* 30*l. the defendant, at the suggestion of the plaintiff, demanded repayment of the* 15*l.*, *which the plaintiff accordingly then paid*: —Held, *in the absence of evidence that the transaction was a sham, that the bill of sale was valid.*

Special Case stated by consent in order to obtain the opinion of the Court as to the validity of a bill of sale.

The plaintiff was a joiner and builder, and the defendant was a money-lender.

On the 22nd of October, 1883, the plaintiff applied to the defendant for a loan of 15*l.*, and offered as security a bill of sale on his furniture. The defendant replied he could not lend so small a sum as 15*l.* on a bill of sale, as a new law had come into force (1), and he could not lend less than 30*l.*; but if the plaintiff had sufficient furniture he would lend him 30*l.*, if he agreed to repay 15*l.* on demand and 15*l.* by instalments. The plaintiff replied he did not want as much as 30*l.*, yet if defendant would not lend less than 30*l.* he would borrow that amount, and the plaintiff enquired when demand would be made for the 15*l.* The defendant replied he could not say when he would make the demand for the 15*l*: perhaps soon after the loan was granted, perhaps in a month, and perhaps not for three or six months or longer.

The plaintiff having agreed upon the terms of the loan, the defendant took an inventory of the plaintiff's furniture, which was valued at 40*l.*

On the said 22nd of October, 1883, and in accordance with the arrangement already made, the plaintiff gave the defendant a bill of sale, whereby, "in consideration of the sum of thirty pounds now paid to the grantor by the grantee," the plaintiff assigned to the defendant his furniture, "for the payment of the sum of thirty pounds and interest thereon at the rate of sixty-seven per cent. per annum, payable monthly." The bill of sale then continued as follows: "And the grantor doth further agree and declare that he will duly pay to the grantee the aforesaid principal sum, together with the interest then due, as follows: fifteen pounds on demand, and the balance by equal monthly payments of two pounds, each payable on the 22nd day of each and every month, commencing on the 22nd day of November, 1883."

The sum of 30*l.*, the consideration expressed to be paid to the plaintiff by the defendant on the execution of the said bill of sale was so paid in gold, without any deduction, and the plaintiff put the same into his pocket.

After the plaintiff received the said sum of 30*l.*, and as he was leaving the office of the defendant, the plaintiff said to the defendant, "You had better demand the money now and not bother me again about it, as I don't want it all." The defendant replied, "Very well, I demand payment of 15*l.* due on demand in accordance with the bill of sale." The plaintiff thereupon paid 15*l.* to the defendant's clerk, and received a receipt for the same.

The plaintiff having made default in payment of the instalments, the defendant seized under the bill of sale. The plaintiff thereupon paid the amount due under protest, and brought an action of trespass for illegal seizure. The plaintiff and defendant, being agreed upon the facts, entered into an agreement to stay the action and to state the Special Case, in order that the validity of the bill of sale might be thereby determined.

(1) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 12: "Every bill of sale made or given in consideration of any sum under thirty pounds shall be void."

Fletcher, for the plaintiff.—The bill of sale was, in reality, given for 15*l.*; the transaction was merely colourable for the purpose of complying with the letter of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 12, and so evading the law. The bill of sale is void, because not in accordance with the Act—*Davis* v. *Burton* (2).

Upjohn, for the defendant.—The bill of sale is valid and good at law; it was given for a sum of 30*l.*, which was actually paid over and remained in the possession and under the control of the plaintiff. There is no provision in the Bills of Sale Acts preventing a stipulation that the sum advanced is to be "payable on demand"—*Melville* v. *Stringer* (3); and even if the transaction is an evasion of the Bills of Sale Act, it is not illegal—*Ramsden* v. *Lupton* (4). See also *per* Lord Selborne in *Macbeth* v. *Ashley* (5).

DAY, J.—In my opinion the defendant is entitled to judgment. On the facts and evidence stated in the Special Case, I do not see anything which would justify me in holding the transaction to be a sham. It may have been that the money-lender did not wish the money to be repaid by instalments, but preferred to have the right to recall the 15*l.* whenever he wished. There is nothing in the case inconsistent with that view. How can I assume there was a fraud, or that the transaction was a sham, especially when it is seen that it is the plaintiff who objects to the bill of sale, and that it was not the money-lender who first demanded the repayment, but that it was the borrower who suggested to the money-lender the demand for immediate repayment. The facts do not justify me in holding that the transaction was a violation of the Act.

SMITH, J.—I am of the same opinion. By consent of the parties the facts are set out in a Special Case, and on those undisputed facts we are asked to infer that the bill of sale was necessarily for a consideration less than 30*l.* If the case had been tried by a jury much might have been urged to shew that 15*l.* only was lent, and the jury would have been asked to say whether the transaction was real or not. But on this Special Case we can only draw the inference which ought to be drawn from the facts standing unimpeached, and in that view I come to the conclusion that the bill of sale was not given in consideration of a less sum than 30*l.*

Judgment for the defendant.

Solicitors.—H. D. Henderson, for plaintiff; Howell Thomas, for defendant.

(2) 52 Law J. Rep. Q.B. 636; Law Rep. 11 Q.B. D. 537.
(3) *Ante*, p. 175; Law Rep. 12 Q.B. D. 132.
(4) 43 Law J. Rep. Q.B. 17; Law Rep. 9 Q.B. 17.
(5) Law Rep. 2 Sc. App. 352.

1884. May 20. THE QUEEN *v.* THE JUDGE OF THE COUNTY COURT OF ESSEX *holden at* SOUTHEND. *In re* PERFECT *v.* POYNTER.

County Courts Admiralty Jurisdiction Acts, 1868 *and* 1869—*Ordinary Cause within additional Jurisdiction*—*Jurisdiction of ordinary County Court therein.*

The Judge of a County Court which was not appointed to have Admiralty jurisdiction, and was within the district of a County Court so appointed, refused to try a case on the ground that it was one which an Admiralty County Court had by the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *jurisdiction to try, and that the principal Act* 31 & 32 *Vict. c.* 71 *and that Act, therefore, took it out of his ordinary jurisdiction*:—Held, *that he was wrong.*

This was a rule obtained (under 19 & 20 Vict. c. 108. s. 43) by the plaintiff in an action in the above-named County Court, calling upon the County Court Judge, and the defendant, to shew cause why the County Court Judge should not proceed to hear and determine the action. The action was brought to recover a sum of 7*l.*, balance of freight under a charter-party and a bill of lading. The County Court of Essex holden at Southend, according to the facts as

agreed on the argument of the rule, is not a County Court appointed to have Admiralty jurisdiction, and is within the district of a County Court appointed to have Admiralty jurisdiction. The County Court Judge, on the ground that the case came within the terms of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, sub-s. 1 (which gives to a County Court appointed to have Admiralty jurisdiction jurisdiction to try and determine any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship, provided the amount claimed does not exceed 300*l.*) held that he had no jurisdiction to try the case under his ordinary jurisdiction, and refused accordingly to try it.

J. Gerard Laing, for the defendant, shewed cause.—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 5, enacts that no County Court other than a County Court appointed by Order in Council under that Act to have Admiralty jurisdiction within any district shall, after the date fixed by such Order in Council for the application of the Act, have jurisdiction within that district in any Admiralty cause. The amending Act of 1869 (32 & 33 Vict. c. 51), which by section 2, sub-section 1, gives to a County Court appointed to have Admiralty jurisdiction jurisdiction over such a claim as the claim in this action up to 300*l.*, is by section 1 expressly directed to be read as one Act with the Act of 1868. Consequently, although the claim in this action would apart from those Acts have been within the jurisdiction of an ordinary County Court, there was by reason of those Acts no jurisdiction in this County Court over this claim, it not being the County Court appointed to have Admiralty jurisdiction within the district. No doubt the Act of 1869, section 5, speaks of "any Admiralty or maritime cause," but that language does not shew any intention to place the causes over which jurisdiction is given by the Act of 1869 on a different footing from causes over which jurisdiction is given by the Act of 1868, which by section 3 were said to be "in this Act referred to as Admiralty causes."

He referred to *The Swan* (1), *Simpson* v. *Blues* (2), *The Cargo ex Argos* (3) and *The Alina* (4).

Tyser, for the plaintiff, supported the rule.—There is nothing in either Act to take away any ordinary jurisdiction of an ordinary County Court. And if the Act of 1868 does by section 5 take away from an ordinary County Court all jurisdiction in an "Admiralty cause" it has no such effect as to a "maritime cause."

HAWKINS, J.—I am of opinion that the learned County Court Judge was wrong. It is conceded that this claim would have been within the ordinary jurisdiction of the County Court before the passing of the County Courts Admiralty Jurisdiction Acts of 1868 and 1869. But it is said on the part of the defendant that those Acts have taken away the jurisdiction which would but for those Acts exist. The Act of 1868 says by section 3 that "any County Court having Admiralty jurisdiction"—that is to say, a County Court appointed by Order in Council under that Act to have Admiralty jurisdiction—"shall have jurisdiction .... to try and determine . . . the following causes (in this Act referred to as Admiralty causes)," and then mentions claims for "salvage" up to a certain amount, for "towage, necessaries, or wages" in like manner, for "damage to cargo or damage by collision" in like manner, and any cause in respect of any such claim irrespective of amount where the parties duly consent to giving jurisdiction. Thus the Act in effect defines the meaning of the expression "Admiralty cause," and says "Admiralty cause" in this Act means one of the causes specified. Then section 5 enacts that from the date of application of the Act to any district "no County Court other than the" County Court appointed to have Admiralty jurisdiction there "shall have jurisdiction within that district in any Admiralty cause." The claim in this case is not one of the claims specified in sec-

(1) 40 Law J. Rep. Adm. 8; Law Rep. 3 A. & E. 314.

(2) 41 Law J. Rep. C.P. 121; Law Rep. 7 C.P. 290.

(3) 42 Law J. Rep. Adm. 1; Law Rep. 5 P.C. 134.

(4) 49 Law J. Rep. P., D. & A. 40; Law Rep. 5 Ex. D. 227.

tion 3, and therefore is not an "Admiralty cause" within the meaning of section 5, and consequently remains within the ordinary jurisdiction of an ordinary County Court unless taken out of it by some other enactment. Has the Act of 1869 any such effect? I think not. It merely enacts by section 2 that "any County Court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction . . . . to try and determine" certain causes, among which is such a cause as the present; and is merely an enabling enactment.

SMITH, J.—This case raises a point of some importance with regard to the jurisdiction of County Courts near the coast. Mr. Laing, on the part of the defendant, concedes that the County Court Judge would, as the law stood before the passing of the County Courts Admiralty Jurisdiction Acts of 1868 and 1869, have been bound to try this case; but contends that the law now stands otherwise. Let me take first the Act of 1868 apart from the Act of 1869. The Act of 1868, which is entitled "An Act for conferring Admiralty Jurisdiction on the County Courts," appears clearly to be in object a statute to give jurisdiction, not a statute to take away jurisdiction. That Act by section 3 enacts that any County Court having Admiralty jurisdiction—that is to say, appointed under the Act to have Admiralty jurisdiction—shall have jurisdiction to try and determine certain causes "in this Act referred to as Admiralty causes," thus making perfectly clear what the Act meant by an "Admiralty cause." Then section 5 enacts that "no County Court other than the County Court" appointed by Order in Council to have jurisdiction within any district shall, after the date from which the Order in Council has effect, "have jurisdiction within that district in any Admiralty cause." The present cause is not one of the causes specified in section 3; and therefore, Mr. Laing admits, if the Act of 1868 stood alone, there would be nothing to take away the jurisdiction of the Southend County Court in this case. Then comes the Act of 1869. Section 2 of that Act says that "any County Court appointed . . . . to have Admiralty jurisdiction shall have jurisdiction . . . . to try and determine" certain causes, being, first, claims up to 300*l.* of the descriptions there mentioned, of which the claim in this action is one; and, secondly, similar claims irrespective of amount where the parties consent to give jurisdiction. Thus that Act confers on certain County Courts still further jurisdiction, including jurisdiction up to 300*l.* (or, by consent, up to any amount) over such a claim as the claim in this action. But where is anything to be found either in the Act of 1868 or in the Act of 1869 to take away from an ordinary County Court its ordinary jurisdiction to try an action for 7*l.* freight under a charter-party? I do not see anything which has that effect. And I know of no decision that there is anything having that effect.

Rule absolute.

Solicitors—Rollit & Sons, for plaintiff; Digby & Digby, agents for Arthy, Rochford, for defendant.

1884. May 7, 13.

BOOTH v. SMITH.

Annuity — Rentcharge — Release — Contribution—22 & 23 *Vict. c.* 35. *s.* 10.

G. died in 1875, *having devised copyhold land to W. G., charged with an annuity to the plaintiff. On the* 24*th of July*, 1876, *W. G. contracted to sell part of the land to the defendant, and on the* 31*st of July*, 1876, *W. G. surrendered the residue of the land in fee to W., and the plaintiff by deed released the land surrendered to W. from the annuity. In* 1883 *the plaintiff sued the defendant for arrears of the annuity*:—Held, *that the plaintiff could not recover, the right of the defendant to hold his portion of the land freed from the annuity being preserved by the saving clause of* 22 & 23 *Vict. c.* 35. *s.* 10.

Action tried before Stephen, J., without a jury.

The action was commenced on the 7th of May, 1883, to recover arrears of an annuity of 20*l.* per annum for five years.

Booth v. *Smith.*

In March, 1875, Frederick Griffiths died, having by his will devised in fee to his son William Griffiths his house, shop and premises at Epping, together with the garden and stabling, subject to an annuity of 20*l.* to his daughter, the plaintiff, for her life. On the 24th of July, 1876, William Griffiths contracted to sell a part of the property so devised to him to the defendant for the sum of 80*l.* The purchase-money was to be paid and the defendant let into possession on the same day. On the 31st of July, 1876, William Griffiths surrendered the remainder of the property so devised to George Wright for the sum of 350*l.*, and by a contemporaneous deed the plaintiff released the part of the property so conveyed to Wright from the annuity.

John Cutler, for the plaintiff.—At common law the release of part of the hereditaments subject to the rentcharge would release the whole. But now, by 22 & 23 Vict. c. 35. s. 10, it is provided that "the release from a rentcharge of part of the hereditaments charged therewith shall not extinguish the whole rentcharge, but shall operate only to bar the right to recover any part of the rentcharge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release."

The portion of the land therefore bought by the defendant remains subject to the whole annuity, and he is liable for all the arrears. The right reserved to him by the final clause of the section is the right to sue the purchaser of the residue of the land for contribution.

J. G. Witt and *Gilbert Metcalfe*, for the defendant.—The construction put upon the statute on behalf of the plaintiff would lead to the absurdity that, although the plaintiff had by deed released Wright from the annuity, he, in reality, would remain liable, because the plaintiff would recover from the defendant the whole amount of the rentcharge, and the defendant would then recover from Wright an amount proportionate to the yearly value of his land. The defendant is clearly a person "interested in the hereditaments remaining unreleased and not concurring in or confirming the same." His right is therefore saved by the statute. That right is the right which such a person had in contemplation of law before the statute—that is, the right to hold the land free from the rentcharge. If William Griffiths had never sold to the defendant, but had retained that part of the land devised, he could have been sued by the plaintiff, because he concurred in the deed of release to Wright; but the defendant is protected by the saving clause of the statute.

Cutler, in reply.—The construction suggested on the part of the defendant makes the last clause of the section defeat the operation of the first clause.

STEPHEN, J.—The plaintiff was entitled to an annuity of 20*l.* a year charged on a house at Epping and other real property. The house was sold to one person without the annuitant's consent. The other real property was sold to another person with the annuitant's consent, and in the conveyance she released that part of the property from her annuity. The question is, whether the annuitant can recover the arrears of the annuity from the purchaser of the house at Epping.

The case depends on the construction of 22 & 23 Vict. c. 35. s. 10, which is in these words:—"The release from a rentcharge of part of the hereditaments charged therewith shall not extinguish the whole rentcharge, but shall operate only to bar the right to recover any part of the rentcharge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release."

This enactment is construed in different ways by the plaintiff (the annuitant) and the defendant (the owner of the house not released from the annuity). The plaintiff reads the latter part of the section as meaning, "without prejudice to the right of the persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release to sue the persons interested in the released premises for contribution if they the holders of the released premises have to pay the

whole annuity." It is objected to this interpretation that it makes the first part of the section practically inoperative. No one would pay money to have his land released from an annuity if he were liable to be called upon afterwards for contribution to pay it.

The defendant reads the latter part of the section thus—"without prejudice to the right of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release to be free from the whole annuity as they would have been under the old law." Precisely the same objection is made to this as is made to the other interpretation—namely, that it also makes the first part of the section practically inoperative. No one would release part of the land subject to an annuity if the effect of the release were, notwithstanding the statute, to release the whole.

It appears to me that the effect of the concluding part of the section is to make the consent of all the persons interested in the hereditaments remaining unreleased necessary to the release of the part intended to be released and the retention of the rentcharge over the part not intended to be released; and this seems just, as it would otherwise be in the power of the annuitant to throw an increased burden on some of the persons interested in the hereditaments charged without their consent. The only practical difference between the two interpretations is, that the plaintiff's interpretation puts upon the person interested in the property released the burden of getting the consent of the persons not released, whereas the defendant's interpretation puts the same burden on the annuitant. On the plaintiff's view of the statute the person obtaining the release is still liable to contribution, unless he procures the consent of the owners of the unreleased portion to his being freed from contribution. On the defendant's view, the annuitant by freeing part of the land frees the whole, unless she gets the consent of all the owners of the unreleased portions. I see nothing in the consequences of either view to lead me to one interpretation rather than the other. Each, when worked out, produces an intelligible result.

The language of the section appears to me, after much consideration, more favourable to the view of the defendant than to that of the plaintiff. The release, it says, is to operate only to bar the right to recover any part of the rentcharge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons (which I understand to mean to any right of any person) interested in the hereditaments remaining unreleased and not concurring in or confirming the release.

Now, the right of a person whose property is subject to a rentcharge to be discharged from it, if other land subject to it is released, is clearly one of the rights which he had when this enactment was passed; his right to claim contribution if he was forced to pay the whole being the other. This last-mentioned right becomes unimportant, no doubt, if the first still exists; but this is no reason for narrowing the plain meaning of the words, particularly as they involve no injustice.

There will accordingly be judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors — Tippetts & Son, agents for C. Chambers, Hastings, for plaintiff; Tamplin, Tayler & Joseph, for defendant.

[IN THE COURT OF APPEAL.]

1884. May 2. *In re* THE GUARDIANS OF THE PARISH OF MARYLEBONE *v.* THE GUARDIANS OF THE WYCOMBE UNION.

Poor Law — Settlement of Illegitimate Children—Derivative Settlement of Mother —Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

[For the report of the above case, see 53 Law J. Rep. M.C. 88.]

1884. May 28. } SALM-KYRBURG *v.* POMANSKY.

Practice—Writ of Attachment—Jurisdiction of Judge at Chambers—Judicature Act, 1873, *s.* 39—*Order XLIV. rule* 2—*Order LII. rules* 1 *and* 2.

A Judge at chambers has, since the Judicature Acts, power to order a writ of attachment to be issued against a person who is in contempt by reason of disobedience to a Judge's order, provided only that the application for such writ is made after due notice to the party against whom it is made, pursuant to Order XLIV. rule 2:—*So* held *by* GROVE, J., *and* HUDDLESTON, B. (DAY, J., *dissenting*).

This was an appeal from an order of Mathew, J., at chambers, ordering the defendant to be attached under the following circumstances:—

The defendant had been ordered by Field, J., to deposit certain bills of exchange, the subject of the action, in Court. He appealed against this order to the Divisional Court, who upheld it and dismissed his appeal. The defendant, however, disregarded the order, and, there being no compliance with it, he was brought, on notice, before Mathew, J., to shew cause why he should not be attached.

Kowalski, for the defendant.—This is an order which can only be made by the Court. The Judicature Act has nowhere expressly enlarged the powers of a Judge at chambers in this respect, and Order XLIV. rule 2 only abolishes *ex parte* applications. They must still be made to the Court, only on notice.

Lamaison, for the plaintiff.—Section 39 of the 1873 Act conferred this power on a Judge at chambers; the framers of the rules obviously so assumed—*cf.* Order LII. rule 2. The practice at chambers since the Judicature Act has been continually to grant these applications.

Kowalski, in reply.

DAY, J.—This case seems to me to present a great deal of difficulty, and is one in which I am sorry there is a difference of opinion. Though I cannot agree with that of my learned brothers, I am glad that they are able to take a different view from mine, because I think that theirs is broader and more convenient, and is also, as we are told, in accordance with the practice under the Judicature Acts for some years past. There are here no merits, and it would be exceedingly desirable that a writ of attachment should issue as speedily as possible. I, however, feel constrained to differ, because I look upon the question in principle as one of importance.

The practice before the Judicature Acts was to confine the issue of the writ of attachment to the Court; and it was always moved for in Court. No Judge sitting at chambers could give leave for it to issue. Its issue was the act of the discretion of the Court exercised in public.

Now it is said that by reason of the language of the Judicature Act, or of the rules framed under it, the power is extended to a Judge at chambers. I look with jealousy on such extension of power where the liberty of the subject is involved, and the extension is one alleged to have been conferred by implication and not expressly. The language which is said necessarily to imply such extension is to be found in section 39 of the 1873 Act. It is open, I acknowledge, to various constructions, but I think the more natural and obvious one to be against the effect contended for by the plaintiff.

[The learned Judge then read the section.]

I find here the word "respectively," which is, in my opinion, the key to the interpretation of the section. So read, the section gives to a Judge in Court the same power as any other Judge in any other Court had previously possessed; and a different interpretation would give to a Judge at chambers any power which any Court had previously possessed. So I think that this power is not given by the section.

But then our attention is called to rule 2 of Order XLIV. That says, "No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued." That however, I think, only abolishes the formal *ex parte* applications for writs of attachment, and, though it uses the words "Court or a Judge," it does not confer any power on a Judge as distinguished from

the Court—and we know that, as a fact, a Judge in chambers had not power at that time. I think, therefore, that this power of issuing writs of attachment should not be extended by mere implication, and so I prefer to leave the matter where it stood, and require persons wishing to attach others to apply openly in Court.

HUDDLESTON, B.—I am sorry that I do not agree with my brother Day. I think that a Judge at chambers has this power of enforcing his own orders. He makes an order for a certain thing to be done. Such order is within his jurisdiction to make. It is disobeyed. What is to be done to enforce it? It is said that it must be made a rule of Court, and that then it must be served as such, and if still disobeyed application must be made to the Court for a writ of attachment; and that, in short, the old practice must be pursued. The old practice would involve this application being for a rule *nisi*. But Order LII. rule 2 does away with rules *nisi* for attachment, so that the exact old procedure cannot be followed. The practice prior to the Judicature Acts was that the order of the Judge was made a rule of Court, and attachment issued because it was said that the act of disobedience was to the Court, and was contempt of Court. But since the Judicature Acts it has been the regular practice to issue writs of attachment at chambers. I quite agree that it is not desirable, having regard to the liberty of the subject, to extend the power of attaching a person by mere implication and without safeguards; but also I think it not desirable that a Judge should make an order and not be able to enforce it. Under these circumstances I look at section 39 of the 1873 Act. It is not so precise and clear as it might be, but if I construe the word "respectively" by the word "either," then it would confer power on a Judge to do at chambers what a Judge previously might have done either in Court or in chambers. Undoubtedly before the Judicature Acts, a single Judge did sit sometimes in Court—as in the Bail Court, and small Court of Exchequer—and sitting there he could, on motion, grant a writ of attachment. This power would thus, on my construction of the section, be given to a Judge at chambers. I admit that I must limit or enlarge the word "respectively," but I am supported in my view of the section by the rules of Order XLIV., which provide that a writ of attachment cannot issue without the leave of the Court or a Judge—that is, a Judge at chambers.

No doubt there must be notice to the party sought to be attached, but that is not necessarily notice of motion in Court; and the words in that rule, "leave of a Judge," must be rejected if the writ can only be granted by the Court. It is clear, to my mind, that the framers of the rule thought that section 39 meant that a Judge at chambers had the power previously exercised only by a Judge in Court. They therefore took the same view of the section that I do. I think that this appeal should be dismissed, with costs.

GROVE, J.—I have felt great difficulty as to the first point, and regret that my conclusion is different from that of my brother Day. No doubt section 39 is ambiguous: if it stood alone I am not sure that I should not take the same view that he does; but on reading the whole section and Order XLIV. rule 2, and Order LII. rule 1, I cannot do so. Section 39 would not have altered the previous law if it had only said that a Judge at chambers should exercise the same jurisdiction as a Judge at chambers had previously exercised. It means something more. I admit that there is a difficulty in the word "respectively," but it is not conclusive in favour of one interpretation. Then the section says, "or as may be directed or authorised to be so heard by any rules of Court to be hereafter made." Order XLIV. rule 2 says that for writs of attachment the leave of the Court or a Judge shall be necessary. Section 39 further says, "any Judge sitting in Court shall be deemed a Court." Now, apply to these words rule 2 of Order XLIV. and what do they obviously mean? "Without the leave of the Court"—that is, a Judge sitting in Court; or "without the leave of a Judge"—that is, a Judge sitting at chambers.

Those seem to me the only alternatives, and I can give no other construction to the section and rule than that the leave of a Judge at chambers will suffice.

Again, this rule is in the negative; and I think, differing on this point from Mr.

Salm-Kyrburg v. *Pomansky.*

Justice Day, that it is a necessary implication from the words that a Judge at chambers had power to issue the writ: the only other condition imposed being that it must be applied for on notice. So that giving this new power to a Judge, it guards it in this way by requiring notice. I am partly confirmed in this construction by Order LII. rule 1, where the words, "a Judge in Court," are used where it is intended to express this, and therefore it would follow that "a Judge," simply, would mean a Judge at chambers.

Then I find that the practice has been universal since the passing of the Judicature Acts to issue writs of attachment at chambers. For these reasons I am of opinion that a Judge at chambers may issue writs of attachment, provided that application is made to him after notice to the party; and that therefore this appeal fails.

Appeal dismissed.

NOTE.—The defendant had a day given for hearing of this case as urgent by the Court of Appeal; but not appearing to prosecute his appeal the judgment of the Divisional Court was affirmed without argument.

Solicitors—Hulbert, for plaintiff; Mozley & Dennison, for defendant.

1884. March 17. } MEAKIN (*appellant*) v. MORRIS (*respondent*).

Master and Servant—Infant Apprentice—Employers and Workmen Act (38 & 39 *Vict. c.* 90)—*Validity of Indenture of Apprenticeship—Stipulation to the prejudice of Infant.*

[For the report of the above case, see 53 Law J. Rep. M.C. 72.]

[IN THE COURT OF APPEAL.]

1884. Feb. 19. May 30. } HOLLINS v. VERNEY AND OTHERS.*

Prescription Act (2 & 3 *Will.* 4. c. 71), *s.* 2—*Right of Way—Easement—Removal of Wood cut at intervals—Non-continuous User.*

Notwithstanding the rule against presumptions in section 6 *of the Prescription Act, if a user for more than the statutory periods mentioned in that Act is proved, a non-user for more than a year within those periods from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory periods. But the total absence of user in each year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment, notwithstanding a temporary non-user.*

In an action for trespass on certain land belonging to the plaintiff, the defendants by their statement of defence pleaded a right of way, under section 2 *of the Prescription Act, by reason of twenty years' user as of right. The right of way so claimed was in respect of the removal of timber over an ordinary metalled road, which led to some mills the property of the plaintiff, and passed for some distance alongside a wood which belonged to one of the defendants. There was a gate from this road into the wood, and the wood for about half a mile sloped sharply down to the road. At the end of the slope there was a way by which carts could pass from the road to the upper part of the wood. The timber on this slope was not cut at the same time, but at intervals of several years, the last cutting having been in the year in which the action was commenced, the previous cutting fifteen years before, and the next at another interval of fifteen years. At the time of such cuttings the road had been used as often as was necessary for the purpose of removing timber for a period of upwards of thirty years:—*

Held, *that the claim in respect of the right of way did not satisfy the requirements of section* 2 *of the Prescription Act.*

* *Coram* Brett, M.R.; Lindley, L.J., and Bowen, L.J.

Hollins v. *Verney, App.*

Appeal by the defendants from a decision of the Divisional Court. The case is reported *ante*, p. 30, where the facts are set out.

The Solicitor-General (*Sir Farrer Herschell, Q.C.*), *J. C. Lawrance, Q.C.*, and *W. Graham*, for the defendants.

J. W. Mellor, Q.C., and *E. W. Garrett*, for the plaintiff.

Dare v. *Heathcote* (1), *Hanmer* v. *Chance* (2) and *Gale on Easements* (3) were cited in addition to the authorities referred to in the judgment of the Court.

The judgment of the Court was delivered (on May 30) by

LINDLEY, L.J. — This was an appeal from the decision of the Divisional Court. The action was for trespass on the plaintiff's land, and was commenced on the 16th of June, 1882. The defendants pleaded a right of way for carting timber and underwood from a wood of their own. It was conceded that the right of way claimed could not be established by immemorial prescription at common law, inasmuch as the right could be shewn to have originated in modern times. Nor was any attempt made to establish the right of way as a way of necessity, or as a way created or reserved by any grant actual or presumed. The contention was that the case was brought within the Prescription Act, 3 & 4 Will. 4. c. 71, and that the evidence given at the trial in support of the right of way amounted to the proof required by that Act. Some of the evidence given at the trial went to shew an actual user of the way every year for more than twenty-five years before action; and if this evidence had been reliable the right of way would clearly have been established. But this part of the evidence was very conflicting and unsatisfactory, and the learned Judge who tried the case has reported that if the jury meant to find a verdict for the defendants on this ground such a verdict ought not to be allowed to stand. There was, however, other evidence, shewing that the timber on what was called the slope of the wood had been cut in the years 1851, 1852, 1853, and again in the years 1866, 1867, 1868, and again in the year before the action was commenced, and that in these years the timber cut was carted along the way in question as of right and without interruption; so that the plaintiff had, in fact, for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose. The evidence on this point was satisfactory, and if the jury found for the defendants upon the ground that this limited user was proved, the learned Judge reports that he is not dissatisfied with it. He, however, gave no judgment for either party. Under these circumstances the plaintiff obtained a rule to shew cause why the verdict should not be set aside and a new trial had. The defendants, on the other hand, asked the Court to give judgment for them upon a claim of a right of way restricted to carting timber cut on the slope of the wood. The Divisional Court, after hearing both sides, set aside the verdict and gave judgment for the plaintiff with nominal damages, and decided in effect that such a right as the defendants claimed cannot be established under the Prescription Act by such evidence of user as the defendants were compelled to rely upon.

The question thus raised is one of very considerable importance, and, in substance, is whether a right of way can be established under the Prescription Act, 2 & 3 Will. 4. c. 71, where, on the one hand, the right can only be proved to have been actually exercised for a period of over thirty years, on what are substantially three occasions, at intervals of twelve years, but where, on the other hand, the person claiming the right did not require to exercise it on any other occasion. The sections of the Prescription Act material for consideration in order to determine the question thus raised are—first, the preamble; secondly, section 2, relating to ways; thirdly, section 4, relating to the computation of the periods mentioned in section 2 and defining the meaning of interruption; fourthly, section 5, relating to pleadings; and fifthly, section 6, relating to presumptions. These various provisions

(1) 25 Law J. Rep. Exch. 245; affirmed in error, 26 Law J. Rep. Exch. 164.
(2) 34 Law J. Rep. Chanc. 413.
(3) 5th ed. pp. 174, 175.

must be read together, for they illustrate and explain each other. They shew—first, that in order to establish a right of way under the Act in question it is necessary that the way shall have been actually enjoyed by some person claiming right thereto without interruption for the full period of twenty years; secondly, that this period is to be reckoned next before some suit or action wherein the right of way shall have been brought in question—see as to this *Richards* v. *Fry* (4), *Wright* v. *Williams* (5) and *Ward* v. *Robins* (6); thirdly, that the expression "without interruption" means without such an interruption as is described in section 4; fourthly, that no presumption is to be made in favour of any claim upon proof of the exercise or enjoyment of the right of way claimed for any less period than the full period of twenty years mentioned in sections 2 and 4. The meaning of "as of right," or "claiming as of right," will be found discussed in *Bright* v. *Walker* (7), *Tickle* v. *Brown* (8) and *Earl de la Warr* v. *Miles* (9); and it has been decided that enjoyment by permission—*The Monmouth Canal Company* v. *Harford* (10)—contentious user—*Eaton* v. *Swansea Waterworks Company* (11)—enjoyment as owner or occupier of the servient tenement—*Battishill* v. *Reed* (12) and *Harbidge* v. *Warwick* (13)—are not enjoyments as of right within the statute. It is not, however, necessary to examine this point with any minuteness, as the right of way claimed in the present case may be taken as having been claimed as of right within the true meaning of sections 2 and 5. It may also be taken that there has been no interruption of the right of way within the meaning of sections 2 and 4. The words "without interruption" in section 2 mean, as already stated, without such an interruption as is mentioned in section 4. The words are not equivalent to "without cessation"; and, paradoxical as it may appear, it has been decided that an enjoyment for nineteen years and three quarters is sufficient to establish a right to light under section 3, although the enjoyment may have been in fact obstructed for the last three months of the full period of twenty years for which the light must be actually enjoyed in order that a right to it may be acquired under the statute. This was decided in 1840 in *Flight* v. *Thomas* (14), both by the Exchequer Chamber and the House of Lords. The easement there in question was a continuous easement—light—and the non-enjoyment for part of the twenty years was due to actual obstruction and not to mere non-user. The case, however, shews that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation. Common sense, moreover, is enough to shew that in order to establish a right of way under section 2 it cannot be necessary to prove an actual continuous user of the way by day and by night for twenty years without any cessation whatever. Whatever fairly amounts to an actual enjoyment as of right of the way claimed for the full period of twenty years mentioned in section 2 is sufficient. But it is obvious, and it has often been pointed out, that in the case of a discontinuous easement, like a right of way, it is extremely difficult, if not impossible, to say exactly what cessations of actual user are and what are not consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves this difficulty to be solved in each case as best it may; but some light is thrown on the subject by sections 4 and 6. Section 6 prohibits the making of any presumption in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than one of

(4) 7 Ad. & E. 698; 7 Law J. Rep. Q.B. 68.
(5) 1 Mee. & W. 77; 5 Law J. Rep. Exch. 107.
(6) 15 Mee. & W. 237.
(7) 1 Cr. M. & R. 211; 3 Law J. Rep. Exch. 250.
(8) 4 Ad. & E. 369; 5 Law J. Rep. Exch. 119.
(9) 50 Law J. Rep. Chanc. 754; Law Rep. 17 Ch. D. 535, 600.
(10) 1 Cr. M. & R. 614; 4 Law J. Rep. Exch. 43.
(11) 17 Q.B. Rep. 267; 20 Law J. Rep. Q.B. 483.
(12) 18 Com. B. Rep. 696; 25 Law J. Rep. C.P. 290.
(13) 3 Exch. Rep. 552; 18 Law J. Rep. Exch. 245.
(14) 11 Ad. & E. 688; 8 Cl. & F. 231; 10 Law J. Rep. Exch. 529.

those mentioned in the other sections of the Act. This section is addressed to presumptions as distinguished from legitimate inferences from facts. It is addressed to Judges rather than to juries. It assumes proof of actual enjoyment for a less period than twenty years, and forbids any presumption being made simply from such short enjoyment in favour of an actual enjoyment for a longer period than that proved; but section 6 does not forbid inferences from an enjoyment for a less period than twenty years and other circumstances, if there are any. Sections 2 and 4 require proof of actual enjoyment for twenty years before action; section 6 says that proof of actual enjoyment for less than twenty years before action will not do; but this after all throws little or no light on the continuity of user requisite to amount to proof of actual enjoyment for the period in question. This view of section 6 is the same as that taken by the Court in *Carr* v. *Foster* (15), which will be alluded to again presently. Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle it has been held that easements the enjoyment of which cannot be prevented cannot be acquired. Thus in *Webb* v. *Bird* (16) it was held that the owner of a windmill cannot gain by prescription a right to the free passage of wind to his mill; in *Sturges* v. *Bridgman* (17) it was held that a person could not gain by prescription a right to make a noise, which for many years affected no one, and which no one therefore could have prevented him from making. Similar reasoning from section 4 has induced some Judges to say that some user must be proved in each year of the period mentioned in the statute—see *Lowe* v. *Carpenter* (18). Looking from this point of view at a right of way exercised only at long intervals of time, it is difficult to see how its exercise can be interrupted or resisted except at those times when it is exercised; and if it cannot be interrupted or resisted during the full period of twenty years, it is difficult to see how it can be actually enjoyed for such period, as of right and without interruption, as required by section 2 of the statute. The difficulty, however, of distinguishing between long and short intervals of enjoyment is not removed by such reasoning. The difference is one of degree rather than one of principle, and the statute does not afford any certain test whereby the difficulty can be solved. The truth is that the question, whether in any particular case a right of way has or has not been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that, having regard to section 6 and the other provisions of the statute, there is no evidence on which the jury can properly find such enjoyment. This view of the statute will explain several decisions which are apparently conflicting and which it is necessary to notice. In *Lawson* v. *Langley* (19) a right of way was claimed under section 2 of the statute. Enjoyment for the full period of forty years was pleaded and sought to be proved. There appears to have been some difficulty in proving actual user for the whole period, and evidence was tendered to shew a user of the way more than forty years ago. The evidence was rejected at the trial, but a new trial was ordered on the ground that the evidence ought to have been received.

(15) 3 Q.B. Rep. 581; 11 Law J. Rep. Q.B. 284.

(16) 10 Com. B. Rep. N.S. 268, 283; 30 Law J. Rep. C.P. 384; affirmed in error, 13 Com. B. Rep. N.S. 841; 31 Law J. Rep. C.P. 335.

(17) 48 Law J. Rep. Chanc. 785; Law Rep. 11 Ch. D. 852.

(18) 6 Exch. Rep. 825; 20 Law J. Rep. Exch. 374, 377.

(19) 4 Ad. & E. 890–91; 6 Law J. Rep. K.B. 271.

The Court evidently thought the evidence admissible for the purpose of enabling the jury to draw an inference of fact, notwithstanding the rule in section 6 against presumptions. Mr. Justice Littledale said: —"If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one." In *Hall* v. *Swift* (20) a watercourse was claimed. The claim was apparently made under section 2 of the Act. Enjoyment for the last nineteen years was proved, but for three years before that the water had not flowed in its accustomed course. Before those three years, however, enjoyment for some time was proved. The report says that there had been some interruption about twenty-two years before the action; but it is tolerably plain that there had been no interruption within the meaning of section 4 of the Act, and that the interruption in the flow of water spoken of was only a cessation. The jury found in favour of the right claimed. An application was made to set the verdict aside on the ground, amongst others, that actual enjoyment for the full period of twenty years before action had not been proved. The Court, however, refused to interfere, Chief Justice Tindal saying, "It would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment." This last remark seems to go rather too far, for under the statute the right is not acquired until it has been enjoyed for the requisite period, and if an immemorial as distinguished from a twenty years' statutory enjoyment can be proved, the right will be established independently of the statute, and will not be lost by a mere temporary non-enjoyment. These two cases, however, seem to establish that if user before the statutory period is proved, and user for eighteen or nineteen years next before action is also proved, the mere fact of non-user for some time immediately after the commencement of the statutory period is not necessarily fatal; and this we consider good law if the non-user is capable of explanation consistently with the continued actual enjoyment as of right. *Bailey* v. *Appleyard* (21) is supposed to be inconsistent with this view; but it is not really so, as will be seen by reading with the report of the case the note explaining it. This note is to be found between pp. 778 and 779 in some copies of 8 *Ad. & E.*, being misplaced in binding. In *Bailey* v. *Appleyard* (21) a right of common was claimed under section 1. Enjoyment for twenty-eight years before action was proved; for much more than two years before that there had been an actual obstruction of the right by means of a stang or bar; before its erection, however, enjoyment was proved for some years. The Judge asked the jury whether the stang or bar had prevented the plaintiff from exercising his right, and told them that, if it had, the proof of prior enjoyment would not assist him; and it was left to the jury to say whether there had been substantially an enjoyment for thirty years or for twenty-eight only. The jury found for the defendant—that is, against the right of common, and the Court held there was no misdirection. It is manifest that the verdict was right and that the decision of the Court was correct, for actual enjoyment as of right for thirty years next before action was disproved, and could not be inferred in the face of the evidence as to the obstruction. In the course of the argument Mr. Justice Patteson expressed an opinion "that the most undoubted exercise of enjoyment for twenty-nine years and three quarters would not have been sufficient"; but this was before *Flight* v. *Thomas* (14) had been decided, and must not be taken as literally true in all cases. In *Parker* v. *Mitchell* (22) a claim was made to a right of way under section 2, and both a forty and a twenty years' user

(20) 4 Bing. N.C. 381; 7 Law J. Rep. C.P. 209.

(21) 8 Ad. & E. 161; 7 Law J. Rep. Q.B. 145.

(22) 11 Ad. & E. 788; 9 Law J. Rep. Q.B. 194.

were pleaded. The evidence shewed a user from a period of fifty years before action, but not for the last four or five years. What the explanation of this was does not appear. The Judge at the trial was of opinion that the claim was not supported, and by his direction the jury found against it; but the evidence on the user was not left to them. The Court refused a rule for a new trial, evidently on the ground that on the undisputed facts the jury could not properly find an actual enjoyment for the full period of twenty or forty years next before the commencement of the action, as required by sections 2 and 4 of the statute (23). This decision seems right in the absence of all explanation accounting for the non-user. In *Carr* v. *Foster* (15) the plaintiff claimed a right of common of pasture. He proved enjoyment for forty years next before action, with the exception of an interval of two years which occurred eighteen years back, and was accounted for by the fact that his predecessor in title had then no commonable beasts. The plaintiff at the trial seems to have relied on the statute, and not on any title he might have acquired independently of the statute; and the case was dealt with, both at the trial and by the Court afterwards, as turning on the provisions of the statute. The Judge at the trial asked the jury whether substantially the right of common had been enjoyed for thirty years next before the action, and the jury found for the plaintiff. A rule was obtained to shew cause why a nonsuit should not be entered, or a new trial had, on the ground that the verdict was against the weight of evidence; but, on argument, the rule was discharged because there had been no interruption within the meaning of section 4, and the cessation of enjoyment was accounted for in such a way as to justify an inference that the right was actually enjoyed for the full period required by the Act, although there was in fact an intermission of enjoyment for two years, part of that period.

This case certainly goes further than any other to be found in the books; but we are not prepared to say it was wrongly decided, nor to hold that the case ought not to have been left to the jury, considering the explanation given of the non-user. At the same time it is difficult to reconcile this case with *Parker* v. *Mitchell* (22), and with those cases already referred to in which it has been held that a way actually used for twenty years before action has not been enjoyed for those twenty years as of right if for any part of that period the dominant and servient tenements have been occupied together. In the one case there has been a total cessation of user for a time, and in the other there has been no cessation of user at all, but only a cessation of user as of right. Why a temporary cessation of user as of right should be more fatal to the acquisition of the right than a total temporary cessation of user, it is not easy to see.

The next and last case to which it is necessary to refer is *Lowe* v. *Carpenter* (18), decided in 1851. The defendant there claimed a right of way under section 2 of the statute. He proved user for forty-eight years before action, with the exception of the last fourteen months, when it did not appear to have been used at all. It also appeared that the way was not used every year, but only as occasion required, for carting timber, lime, &c. Whether this was the reason why the way was not used for the last fourteen months is not stated. The case was tried before Mr. Justice Patteson, who was one of the Judges who had decided both *Parker* v. *Mitchell* (22) and *Carr* v. *Foster* (15). He expressed himself not altogether satisfied with *Parker* v. *Mitchell* (22), and under his direction the jury found for the defendant —that is, in favour of the right claimed— leave being reserved to the plaintiff to move to set aside that verdict and to enter a verdict for himself with nominal damages. The plaintiff obtained a rule accordingly, and, upon argument, the Court decided in his favour. The Court considered *Parker* v. *Mitchell* (22) rightly decided, and that the jury could not upon the evidence find an actual enjoyment for the full period of twenty years next before the commencement of the action, as required by sections 2 and 4 of the statute. Mr. Baron Parke expressed an opinion that proof of some user every

(23) See *per* Patteson, J., in 3 Q.B. Rep., at p. 585.

year was essential to bring a case within the statute, and he referred to section 4 in support of that opinion. But at present there is no decision which goes this length, and we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year. We think that, notwithstanding the rule against presumptions in section 6, if a user for more than twenty or thirty years, as the case may be, is proved, a non-user for more than a year within twenty or thirty years from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, as the jury in fact did in *Carr* v. *Foster* (15). The observations of Lord Justice James in *Earl De la Warr* v. *Miles* (9) shew that this also was his opinion. At the same time the total absence of user in each year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment, notwithstanding a temporary non-user. We confess, however, that we do not appreciate the supposed distinction between a temporary non-user for a year occurring at the beginning or the end or in the middle of the statutory period. *Flight* v. *Thomas* (14) and the language of section 4 shew that an interruption for a year is not fatal, and that an interruption for less than a year is not fatal, whether it occurs at the commencement or end or at any part of the statutory period; so a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatever portion of the period the cessation occurs; and on the other hand a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period. The only difference is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases. But we are not prepared to say that as a matter of law such an inference can in no case be drawn. On the contrary we think it may where section 6 does not apply. In *Parker* v. *Mitchell* (22) and *Lowe* v. *Carpenter* (18) the non-user at the end of the period was apparently unexplained, and was therefore fatal. In *Bailey* v. *Appleyard* (21) the non-user at the beginning of the period was owing to actual obstruction, which was fatal; but, as already pointed out, *Hall* v. *Swift* (20) and *Lawson* v. *Langley* (19) shew that non-user at the commencement of the period is not necessarily inconsistent with actual enjoyment for the full statutory period, and *Carr* v. *Foster* (15) shews that the same is true of a temporary cessation in the middle of the period. We have examined a great number of other decisions upon the Prescription Act, all indeed that we have been able to find, but none of them except those to which we have referred appear to require comment for the purpose of deciding the case before us. It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the *dicta* to be found in them. The only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. And as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right it seems to follow that no actual user can be sufficient to establish it which during the whole of the statutory time (whether acts of user be proved in each year or not) is not enough at any rate to convey to the mind of a reasonable person who is in possession of the servient tenement that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised satisfy even this test? It seems to us that it cannot; that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct

of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute.

Without therefore professing to be able to draw the line sharply between long and short periods of non-user; without holding that non-user for a year or even more is necessarily fatal in all cases; without attempting to define that which the statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendants in this case has been established by evidence of such limited user as was mainly relied upon and as was contended by the defendants to be sufficient in the present case. Upon this point, therefore, we affirm the decision of the Divisional Court, and as the defendants have failed both here and in the Divisional Court on the point of law on which they relied for their defence, they ought, in our opinion, to pay the costs of the appeal and of the motion made to the Divisional Court.

This, however, does not quite dispose of the case. The jury found in favour of the defendants, and they gave some evidence of having carried timber from other parts of their wood along the road in question in several years besides—in 1851 to 1853, 1866 to 1869, and just before the action. This evidence was not satisfactory, and there was a considerable amount of evidence on the other side shewing that the user was by permission and not as of right, and Mr. Justice Cave thought that the verdict ought not to stand unless the defendants were right in their legal contention. At the same time we are not prepared to say that the verdict can be set aside and judgment entered for the plaintiff. The Divisional Court have, however, gone that length. They apparently considered that there was no evidence of user except in the years 1851 to 1853 and 1866 to 1869, and if this had been the case their judgment would have been quite right. But there was some evidence, though unsatisfactory evidence, of more frequent user than in those years; and although, now that the main point on which the defendants relied throughout is decided against them, the verdict in their favour cannot stand, we think they are entitled to a new trial if they desire it, and the judgment of the Court below must be varied accordingly. But it will be useless for the defendants to go down to trial again unless they are prepared with satisfactory evidence of a much more continuous user as of right than they relied on before. If they elect to try the case again the costs of the motion and of the new trial will abide the event. If they do not try the case again they must pay the costs of the action; and, in any event, they must pay the costs of the motion to the Divisional Court and of this appeal, as already stated.

Appeal dismissed.

Solicitors—Field, Roscoe & Co., agents for Dowson & Wright, Nottingham, for plaintiff; Geare, Son & Pease, agents for Martin & Sons, Nottingham, for defendants.

1884. Feb. 13.

DIFIORI *v.* ADAMS.

Ship and Shipping—Marine Insurance—Policy—Construction—"At the wreck."

A policy of insurance was effected on salvage pumps insured "from the 30th of December, 1882, to the 12th of January, 1883, . . . whilst engaged in salvage operations at the wreck of the C.," "including all risk whilst being conveyed from B. to and/or on board the wreck." It was shewn that the C. was floated by means of the pumps which were brought from B. and placed on board her, and that she was kept afloat by the pumps, and that she partly steamed and partly was towed by another vessel for a distance of nearly forty miles, until she had almost reached B., the nearest port of safety, when she sank in deep water, with the salvage pumps on board, on the 4th of January, 1883:—Held, *that the loss was not covered by the policy.*

Action tried before Cave, J., without a jury.

The plaintiff, an Italian contractor, residing at Brindisi, made a contract, on the 24th of December, 1882, with certain

year was essential to bring a case within the statute, and he referred to section 4 in support of that opinion. But at present there is no decision which goes this length, and we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year. We think that, notwithstanding the rule against presumptions in section 6, if a user for more than twenty or thirty years, as the case may be, is proved, a non-user for more than a year within twenty or thirty years from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, as the jury in fact did in *Carr* v. *Foster* (15). The observations of Lord Justice James in *Earl De la Warr* v. *Miles* (9) shew that this also was his opinion. At the same time the total absence of user in each year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment, notwithstanding a temporary non-user. We confess, however, that we do not appreciate the supposed distinction between a temporary non-user for a year occurring at the beginning or the end or in the middle of the statutory period. *Flight* v. *Thomas* (14) and the language of section 4 shew that an interruption for a year is not fatal, and that an interruption for less than a year is not fatal, whether it occurs at the commencement or end or at any part of the statutory period; so a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatever portion of the period the cessation occurs; and on the other hand a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period. The only difference is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases. But we are not prepared to say that as a matter of law such an inference can in no case be drawn. On the contrary we think it may where section 6 does not apply. In *Parker* v. *Mitchell* (22) and *Lowe* v. *Carpenter* (18) the non-user at the end of the period was apparently unexplained, and was therefore fatal. In *Bailey* v. *Appleyard* (21) the non-user at the beginning of the period was owing to actual obstruction, which was fatal; but, as already pointed out, *Hall* v. *Swift* (20) and *Lawson* v. *Langley* (19) shew that non-user at the commencement of the period is not necessarily inconsistent with actual enjoyment for the full statutory period, and *Carr* v. *Foster* (15) shews that the same is true of a temporary cessation in the middle of the period. We have examined a great number of other decisions upon the Prescription Act, all indeed that we have been able to find, but none of them except those to which we have referred appear to require comment for the purpose of deciding the case before us. It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the *dicta* to be found in them. The only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. And as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right it seems to follow that no actual user can be sufficient to establish it which during the whole of the statutory time (whether acts of user be proved in each year or not) is not enough at any rate to convey to the mind of a reasonable person who is in possession of the servient tenement that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised satisfy even this test? It seems to us that it cannot; that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct

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Appeal dismissed.

Solicitors—Field, Roscoe & Co., agents for Dowson & Wright, Nottingham, for plaintiff; Geare, Son & Pease, agents for Martin & Sons, Nottingham, for defendants.

1884. Feb. 13.

DIFIORI *v.* ADAMS.

Ship and Shipping—Marine Insurance—Policy—Construction—"At the wreck."

A policy of insurance was effected on salvage pumps insured "from the 30th of December, 1882, *to the 12th of January,* 1883, . . . *whilst engaged in salvage operations at the wreck of the C.," "including all risk whilst being conveyed from B. to* $\frac{\text{and}}{\text{or}}$ *on board the wreck." It was shewn that the C. was floated by means of the pumps which were brought from B. and placed on board her, and that she was kept afloat by the pumps, and that she partly steamed and partly was towed by another vessel for a distance of nearly forty miles, until she had almost reached B., the nearest port of safety, when she sank in deep water, with the salvage pumps on board, on the 4th of January,* 1883:—Held, *that the loss was not covered by the policy.*

Action tried before Cave, J., without a jury.

The plaintiff, an Italian contractor, residing at Brindisi, made a contract, on the 24th of December, 1882, with certain

underwriters on ship and cargo (not the underwriters now sued), who were anxious to salve the ship *Childeric*, which was ashore on the Missipezza reef, about forty-five miles from Brindisi, and had been abandoned to the above-mentioned underwriters. By the contract the plaintiff was to endeavour to get the *Childeric* into Brindisi and keep her afloat there for three days, on the terms of receiving half the realised value of the ship if successful, and nothing if unsuccessful. For the purpose of this contract the plaintiff purchased three pumps and two portable engines. On the 30th of December, 1882, the plaintiff, through his agents Lamplough & Co., insured the pumps and engines in London for 500*l.*, by a policy the terms of which were as follows, "lost or not lost at and from the 30th day of December, 1882, to the 12th day of January, 1883, both days inclusive, whilst engaged in salvage operations at wreck of *Childeric* near Brindisi, upon .... pumps. The adventures and perils which the assurers are contented to bear are of the seas .... and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the goods, ... including all risk whilst being conveyed from Brindisi to $\frac{\text{and}}{\text{or}}$ on board wreck." The engines and pumps were conveyed in lighters from Brindisi to the *Childeric* and placed on board of her, and on the 3rd of January, 1883, the *Childeric* was floated off, and proceeded to make the best of her way to Brindisi, the pumps and engines being retained on board to keep her afloat. At first she proceeded under steam, and then, her engine-room having become flooded owing to the choking of the suction-pipes, she was taken in tow by another vessel sent to stand by and render assistance; but eventually, after going forty-two miles, she sank in deep water on the 4th of January, 1883, with the pumps and engines on board. The plaintiff sought to recover 500*l.*, the amount insured in the policy so made by his agents on the 30th of December, 1882.

J. G. Witt, for the plaintiff.—The words used in the policy are, "while engaged in salvage operations," and it is not salvage to float a vessel off a reef and then leave her to founder, which would have been the immediate result if the pumps had been taken off the moment she floated. Salvage must mean rescuing from peril and getting into a place of safety. The removal of the pumps as soon as the defendants' vessel was floated would have prevented the salvors from earning their salvage at all —*The Killeena* (1).

The words "including all risk whilst being conveyed from Brindisi to $\frac{\text{and}}{\text{or}}$ on board wreck" do not define the risk, but enlarge it by taking in some further risk not necessarily involved in the previous words. The intention was to insure the pumps before arriving at the ship and while on board the wreck until the salvage operations were completed—that is, by getting the wreck into a place of safety. Even if it be conceded that the words "at wreck" mean at the scene of the wreck, the words "on board" must mean on board the *Childeric*, wherever she was, until salvage operations were complete.

Hollams, for the defendants.—The word "at" must mean the scene of the wreck. The words "on wreck" are inserted to cover the pumps while actually on board the wreck, but are not to be construed as covering the pumps when the vessel had been moved away from the scene of the wreck.

He cited *Wingate v. Foster* (2).

CAVE, J.—I am of opinion in this case that my judgment must be for the defendant. The policy is a peculiar one; and undoubtedly had the words been simply, "From the 30th of December to the 12th of January," the loss, having occurred within that time, would have been covered by the policy. But the generality of the words is limited by one sentence, and that limitation is extended somewhat by a subsequent sentence.

The limitation is, "whilst engaged in salvage operations at the wreck of the *Childeric*." I am clearly of opinion that the pumps at the time of the loss were not engaged in salvage operations at the wreck of the *Childeric*. Mr. Witt has

(1) 51 Law J. Rep. P., D. & A. 11.
(2) 47 Law J. Rep. Q.B. 525; Law Rep. 3 Q.B. D. 528.

contended that "at" has the same meaning as "on"; but it seems to me an impossible construction to put upon the preposition "at." No one ever speaks when on board ship of being "at" the ship. I suppose when Lady Brassey was performing her voyage round the world in the *Sunbeam* it never occurred to her to speak of being "at" the *Sunbeam*. She speaks of being here and there and at other places, but never as being "at" the *Sunbeam*. The preposition "at" refers to some fixed and definite place, and therefore, in my opinion, cannot have the same meaning as the preposition "on," as indicating the pumps when on the *Childeric*, after she had been got off and when she was moving about from place to place.

Therefore if the case stopped there it would, in my opinion, be a clear case for the defendant.

Then there come further words at the end which are intended to add something to the risk, which, so far, is undertaken by the policy; and those words are, "Including all risk whilst being conveyed from Brindisi to $\frac{\text{and}}{\text{or}}$ on board the wreck." That undoubtedly does extend the meaning of the former words, because the former words would certainly not have covered the conveyance from Brindisi to the wreck. But how much is intended to be covered by that? To my mind a very important word in that sentence, which I cannot possibly get rid of, is "conveyed." That clause, to my mind, is intended to cover a certain conveyance. What conveyance? To my mind it is the conveyance from Brindisi to the wreck, and when at the wreck the conveyance from the lighter on board the wreck. I cannot see that anything more is intended by these words.

That appears to me to be the natural interpretation to be put upon the language, and if it had been intended that when the ship had been got off the reef, and consequently was being taken back either to Brindisi or some other port of safety, I should have expected to find in the policy some words calculated to cover, not merely what is covered, the journey of the pumps and engines out, but also the journey of the pumps and engines back again. I can find no words which fairly and legitimately do cover the journey back again; and therefore, in my opinion, in the circumstances which actually occurred, I think that the loss is not within the policy, and that therefore the defendant must have judgment with costs.

Solicitors—Pritchard & Sons, for plaintiff
Waltons, Bubb & Walton, for defendants.

[IN THE COURT OF APPEAL.]

1884. July 9.

MATHEWS *v.* OVEY.*

Practice—County Courts—Appeal by Motion—Motion ex parte or on Notice—County Court Act, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*Order XXXIX. rules* 1–4—*Order LII. rules* 2 *and* 3.

A County Court case brought on appeal by motion to the High Court is not "a cause or matter" within the meaning of Order XXXIX. rules 1–4, *nor an "action" within Order LII. rule* 2, *and the procedure is not by way of notice of motion under those Orders, but by motion ex parte in the first instance under the County Court Act*, 1875, *s.* 6, *which is not superseded by the Rules of the Supreme Court*, 1883.

Shapcott *v.* Chappell (*ante*, p. 77; Law Rep. 12 Q.B. D. 58) *questioned.*

Argument in an action in the Bow County Court of a rule *nisi* to enter judgment for the plaintiff or for a new trial by way of appeal from the decision of the County Court Judge, who had entered judgment for the defendant on the findings of the jury.

The rule had been refused by Manisty, J., and Williams, J., following an unreported decision of Lord Coleridge, C.J., Grove, J., and Smith, J., on the ground that the procedure should have been by notice of motion, and not by motion for a rule *nisi*. A rule *nisi* having been granted by the Court of Appeal on the *ex parte* application of the plaintiff,

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

Mathews v. *Ovey, App.*

Rose-Innes shewed cause.—By Order XXXIX. rule 3, "Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to shew cause, or formal proceeding other than such notice of motion shall be made or taken." This is an application for a new trial, and should be by notice of motion and not rule *nisi*. By Order LII. rule 2, it is provided that "no motion or application for a rule *nisi* or order to shew cause shall hereafter be made in any action." The word "action" includes County Court action. By section 100 of the Judicature Act, 1873, applied to the Rules by Order LXXI. rule 1, "action" is defined as "a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by the Crown." This is exhaustive, and includes all civil proceedings while it excludes all criminal proceedings. Notice of motion ought to have been given under Order XXXIX. In *Shapcott* v. *Chappell* (1) Lord Coleridge, C.J., Stephen, J., and Mathew, J., held that Order XXXIX. rule 6, providing that a new trial need not be granted in certain cases if there be no miscarriage of justice, applied to County Court cases brought into the High Court on appeal.

Ruegg, for the plaintiff.—Order LII. rule 2 does not apply to County Court actions, because they are not commenced by writ. Order XXXIX. does not contemplate County Court cases. Rule 1 deals first with causes or matters in the Probate, Divorce and Admiralty Division, and afterwards with "other causes or matters," that is, causes or matters in other divisions. If the rule applies to County Court cases it follows that the appeal in County Court cases tried without a jury is to the Court of Appeal, as it is provided that the motion for a new trial shall be "where there has been a trial without a jury by appeal to the Court of Appeal." Order LII. rule 3 contemplates cases in which the rule *nisi* is retained, because it says "except where, notwithstanding rule 2, a motion or application may be made for an order to shew cause only," every motion shall be on notice. The County Court Act, 1875, s. 6, is not repealed, and great inconveniences arise if the appeal is by notice of motion. For example, by section 6 the rule *nisi* is "to be granted on such terms as to costs, security or stay of proceedings as to the Court to which such motion shall be made shall seem fit." If the appeal is by notice of motion, there must be separate motions for the stay of proceedings and security.

(1) *Ante*, p. 77; Law Rep. 12 Q.B. D. 58.

Brett, M.R.—I am obliged to come to the conclusion that the decision of the Court below was wrong, and that the objection to the form of the proceeding must be overruled. I am extremely sorry to do so, because I am inclined to think that it would be very useful if many of the rules of Order XXXIX. were applicable to County Court cases. Whether the rule under discussion could usefully be applied to County Court cases I do not undertake to say, but as to the rule in question in the case of *Shapcott* v. *Chappell* (1) it would undoubtedly be useful to apply it to County Court cases, and I am sorry to say that if we come to the conclusion that Order XXXIX. does not apply to those cases, *Shapcott* v. *Chappell* (1) was wrongly decided. The importance of the question before us is very great, because by 38 & 39 Vict. c. 50 protection is given to the person who has obtained judgment in the County Court. His judgment cannot be challenged except by motion *ex parte* in the first instance. If that were the only consideration I should not be much troubled by it, but the rule *nisi* is only to be granted "on such terms as to costs, security or stay of proceedings" as the Court shall think fit; the party who has succeeded in the County Court is under this section not put to any expense until the superior Court has had an opportunity of considering whether he ought to be put to expense with or without terms imposed as to the stay of proceedings and security for costs. On the other hand, if the Rules of the Supreme Court, 1883, apply, the successful party in the County Court must take some proceedings and be at some cost before the superior Court has had an opportunity of considering whether he ought to be called upon to do anything or of protecting him. It is

argued that the Rule Committee of the Judges can take away this protection and repeal it by rules, and that they have done so. There may be considerable doubt whether there is power given to make rules in regard to cases in the County Court. This is said to be a proceeding in the Supreme Court, and so it is, and therefore it is argued that there is power to regulate it. On the other hand, you must look to the Judicature Act itself and see whether the power to make rules was intended to extend to County Court cases on appeal. Whenever it becomes necessary to determine whether the Rule Committee have that power, the question will require very considerable argument on both sides. I have the gravest doubts whether it exists, but I do not decide it. It is not necessary to do so, because, assuming that power, it seems to me that the rules have not exercised it. The words of Order XXXIX. rule 3, are in one sense sufficiently large, but we must look at the meaning of the words as gathered from the whole context. There are other rules in the same Order. Let us take rule 1. The first part of the rule applies to causes or matters in the Probate, Divorce and Admiralty Division, and the rest of the rule provides that the motion must be, "in every other cause or matter where there has been a trial thereof or of any issue therein with a jury, to a Divisional Court of the Queen's Bench Division, and where there has been a trial without a jury by appeal to the Court of Appeal." As I have said, the words are large enough in a sense, but if they apply to a County Court case tried like this case by a jury, they apply to a County Court case tried by a Judge. If so, the appeal is to the Court of Appeal. It is impossible to suppose that such a result could have been intended. It is opposed to Order LIX. rule 1, which provides that appeals under section 6 of the County Court Act, 1875, shall be to a Divisional Court. Then rule 2 of Order XXXIX. provides that "no Judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself." "Cause or matter" in that rule clearly cannot include County Court cases. Passing over rule 3, which is the rule in question, we come to rule 4, which provides the time for applying for a new trial when the trial takes place in London or Middlesex—that refers, as every one knows, to the trials which used to be at Guildhall and Westminster—and the time when the trial takes place on the circuits for England and Wales. This is obviously an exhaustive rule, and intended to apply to all the trials dealt with, and shews that rule 3 refers to cases tried in London or Middlesex, or on circuit. It is clear that those who drew rule 3 meant it to apply to the trials mentioned in rule 4 and not to County Court cases. It is said that this case is an "action." But the interpretation clause defines action as "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." But rules of Court cannot prescribe how a County Court action is to be commenced, and it is not commenced by writ but by plaint. "Action" does not include a proceeding in a County Court, and therefore Order LII. does not apply. Order XXXIX. in fact does not apply to County Court cases. The misery of this decision is that Order XXXIX. rule 6 does not apply to County Court cases. The "new trial" referred to in that rule, which restricts the granting of new trials where there has been no miscarriage, is the same new trial as in rule 3. All the rules are speaking of the same thing. I cannot agree with *Shapcott* v. *Chappell* (1). The judgments in that case do not deal with the precise wording of the rule. The Lord Chief Justice and the other Judges applied a large and beneficent interpretation to the rules, but, with deference, it was an attempt to legislate. The result is that appeals from the County Court must be made according to section 6 of 38 & 39 Vict. c. 50, and *ex parte* in the first instance. A motion was so made in this case, but the Court refused to hear it. It was made in time, and we shall be obliged to hear it on its merits. What I have said of *Shapcott* v. *Chappell* (1) is in reference to the arguments used by the Judges in that case, but possibly there may be other considerations which might support the decision (2).

(2) The fact that *Shapcott* v. *Chappell* was tried by the County Court Judge without a

Mathews v. *Ovey, App*

BOWEN, L.J.—I am of the same opinion, and I should not add anything except for the fact that we are overruling a tribunal of great authority, to the decisions of which we give great weight and pay great respect. I am of opinion that Order XXXIX. rule 3 does not apply to appeals under 38 & 39 Vict. c. 50. s. 6. The legislation as to County Court appeals ought briefly to be borne in mind. By 13 & 14 Vict. c. 61. s. 14, an appeal was given by Special Case in common law actions, but the appellant was to give security; and by 28 & 29 Vict. c. 99 in equity cases subject to a deposit; and by 38 & 39 Vict. c. 50. s. 6, the appeal by motion was to be subject to terms as to security. It appears to have been the intention of the Legislature to limit appeals from the County Court. In view of that exceptional legislation we are asked to construe the Rules of the Supreme Court, 1883, in such a way as to alter 38 & 39 Vict. c. 50. s. 6, and deprive the litigant of that protection. Whether these rules could affect the Act it is not necessary now to decide: when the question arises it will receive the consideration which its gravity and importance demand. The short answer to the contention made is that Order XXXIX. rule 3 applies only to cases in the High Court. I will not go through the rules, but I adopt what has been said by the Master of the Rolls. As to the case of *Shapcott* v. *Chappell* (1), I agree in the view of the Master of the Rolls. The authority of that case is shaken by our decision. Whether it can be shewn that some other interpretation than that which we now put on rule 3 can be put on rule 6 I am not prepared to say—I reserve my opinion; but the prospect does not appear to be bright. I agree that there may possibly be something in the County Court Acts themselves which deals with the subject of that rule in the same remedial way, but I think that the Divisional Court below was misled by a desire broadly to apply useful legislation to a class of actions to which they do not apply.

jury is not noticed in the judgment of the learned Judges, but it renders resort to Order XXXIX. rule 6 unnecessary, whether or not it applies to County Court cases.

FRY, L.J.—I am of the same opinion. As to the powers of the Rule Committee I desire to say nothing. The point has not been argued. The question before us is, have the rules dealt with motions for a new trial in County Court actions. I should say that it was reasonably plain that they had not, except for the opinion of the Divisional Court. Order XXXIX. rule 1 does not deal with those cases. "Causes and matters" mean causes and matters in the High Court. The observation which the Master of the Rolls has made as to the appeal being given to the Court of Appeal when there is no jury is, to my mind, very cogent to shew that County Court cases were not intended. If rule 1 applies, rule 4 applies; but it is obvious that it does not, and they are all in the same fasciculus of rules. The same must be said of Order LII. Rule 2 does not apply because "action" means action in the High Court. Rule 3 contemplates the survival of cases in which there is an order to shew cause, and this is exactly one of those cases. With some regret I am of opinion that this decision must be overruled.

Objection overruled.

Solicitors—Hurd & Upward, for plaintiff; John Hales, for defendant.

[IN THE COURT OF APPEAL.]

1884.
April 24, 26.
May 30.

DYE v. DYE AND ANOTHER.*

Husband and Wife—Ante-nuptial Memorandum renouncing his Marital Right signed by Husband—Creation of Separate Use for Wife of her Real Property—Signature to Memorandum—Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 7.

A man, being about to marry a woman who was possessed of real property, signed before the marriage a memorandum by which he covenanted and agreed with the

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

woman that if she should become his lawful wife he bound himself from having any legal or lawful claim upon her property or from receiving or dealing with any property whatsoever which she might possess at the time of her marriage. The woman did not sign this memorandum.

The marriage took place in 1856, *and in* 1880 *the wife made a will devising her real estate to the defendants. She died in* 1881, *and the plaintiff, her heir-at-law, brought an action to establish his title to her real estate*:—Held, *that the plaintiff was entitled to recover, for that the memorandum of agreement not being signed by the woman was not a valid declaration of a trust for her separate use under section 7 of the Statute of Frauds; that the renunciation by the husband of his marital right was not sufficient to clothe the wife with testamentary power over her real property; and that the husband who did not possess the fee could not make a valid declaration of the trust of that fee.*

Appeal from the judgment of the Queen's Bench Division on a Special Case.

An action was begun by the plaintiff to establish his title to recover possession of certain premises in Norfolk consisting of a messuage and shop and five cottages, and to recover the rents and mesne profits thereof.

A Special Case was then stated, the material parts of which were as follows:—

1. The plaintiff is the heir-at-law of one Susannah Mann deceased, who, before her second marriage hereinafter mentioned, was Susannah Chesson, the widow of Carter Chesson. The defendants are the executors and trustees appointed by the will of the said Susannah Mann, and devisees in trust of her real estate under the same.

2. Carter Chesson, who died on the 5th of February, 1850, by his last will dated the 31st of October, 1840, devised all his real estate (which consisted of and comprised the property claimed in this action) to his wife Susannah Chesson for life, and after her decease to his son Carter Chesson, his heirs and assigns for ever, if his said son should survive his (the testator's) said wife; but in case his said son should die in the lifetime of his (the testator's) said wife, and without leaving lawful issue of his body, him and his (the testator's) said wife surviving, then to the testator's said wife, her heirs and assigns absolutely for ever.

3. The testator's son died on the 2nd of April, 1870, in the lifetime of the testator's said wife, without leaving any issue, and Susannah Chesson then became absolutely entitled to all the real estate.

4. Susannah Chesson married Robert Mann in 1856. Shortly before and in consideration of the then intended marriage Robert Mann signed and delivered to Susannah Chesson a document in the following terms:—

"Robert Mann, blacksmith, of Wiggenhall St. Germans, in the county of Norfolk, solemnly covenants and agrees with Susannah Chesson, widow of the late Carter Chesson, that should she become the lawful wife of the above-named Robert Mann, he here by this agreement binds himself from having any legal or lawful claim upon the plate, linen, furniture or household effects, or with receiving or disbursing the rents of her tenements and cottages, or giving orders for the repairs of the same, nor yet with any property whatsoever she is in possession of at the time of her marriage to him. In confirmation of this covenant and agreement he here places his hand and seal.

his
"Robert × Mann,
mark.

"Witness to the above,
"Marth. Wing,
"Wm. Robertson."

5. Afterwards during the coverture of Susannah Mann, in or about the year 1873, one Charles Miller offered, in consideration of a lease being granted to him of the messuage and shop hereinbefore mentioned, to pay Susannah Mann an increased rental in respect thereof; and thereupon, on the 11th of December, 1873, an indenture was made and entered into by and between Robert Mann and Susannah his wife and the said Charles Miller, which, after reciting that Susannah Mann was entitled to the said messuage and shop to her and her heirs in fee simple, proceeded (so far as it is material to be here set out) as follows:—

"And whereas the said Robert Mann and Susannah Mann have agreed to demise

and lease unto the said Charles Miller, his executors, administrators and assigns, the said messuage or tenement and hereditaments now used as a public-house for the term of ten years at the rent of 30*l.*, such rent to be payable to the said Susannah Mann for her separate use, free from the debts, control and engagements of her husband, and her receipt alone to be full discharge to the said Charles Miller, his executors, administrators and assigns."

The indenture witnessed that by that deed intended to be duly acknowledged by Susannah Mann the premises were demised to Charles Miller for ten years at 30*l.* a year, to be paid by him to Susannah Mann for her separate use.

This deed was duly produced to and acknowledged by Susannah Mann in conformity with the provisions in that behalf of the Act of 3 & 4 Will. 4. c. 74.

6. Charles Miller thereupon entered into possession of the premises under this lease, and thence until now has been and still is in possession thereof, and has paid rent for the same in pursuance of the terms of the lease to Susannah Mann till the time of her death hereinafter mentioned.

7. Robert Mann never interfered with the enjoyment and management by his wife Susannah Mann of her property, and neither before or after her decease, hereinafter mentioned, intermeddled with the same.

8. Susannah Mann had no issue by this marriage, and on the 18th of May, 1881, she died leaving Robert Mann her surviving, having duly made and executed her last will or testamentary appointment, dated the 5th of August, 1880, which was in the following terms:—

"This is the last will or testamentary appointment of me, Susannah Mann, of King's Lynn, in the county of Norfolk, the wife of Robert Mann, late of Wiggenhall St. Germans, but now of King's Lynn aforesaid, blacksmith. Whereas by a memorandum in writing made previously to and in consideration of my marriage with the said Robert Mann, the said Robert Mann covenanted and agreed with me, then Susannah Chesson, widow, that should I become his lawful wife he, by that agreement, bound himself from having any legal claim upon the plate, linen, furniture or household effects, or with receiving or disbursing the rents of my tenements and cottages, nor yet with any property whatever I was in possession of at the time of my marriage; and whereas I was in possession at the time of my marriage of a messuage, and three cottages at the rear thereof, situate on the London Road, in King's Lynn aforesaid, and some cottages at Wiggenhall St. Germans; Now I do hereby bequeath all plate, linen, furniture and household effects, and my rents and personal estate, unto James Dye, of 18 Blomefield Street, Hackney, my brother, and Edward Milligen Beloe, of King's Lynn, Norfolk, solicitor, upon trust to pay my funeral and testamentary expenses and debts, and as to the residue upon trusts hereinafter mentioned. And I give, devise and bequeath and appoint unto the said James Dye and Edward Milligen Beloe, and their heirs, executors, administrators and assigns, all that my said messuage, cottages and hereditaments, and all other the property of which I was in possession at the date of my said marriage, with their appurtenances, to hold the same unto the said James Dye and Edward Milligen Beloe, their heirs, executors and administrators, upon trust to sell the same and convey the same to the purchasers or purchaser thereof."

9. The defendants, as devisees in trust under the said will, have taken and been in possession of or received the rents of all the real estate in respect of which this action is brought since the death of the said testatrix, and contend that the said testatrix had power to devise the said real estate to them. And they further contend that, in any case, they are entitled to receive and retain the rents accruing due under the lease to Charles Miller of the 11th of December, 1873, from the date of the death of Susannah Mann. The plaintiff denies that the said testatrix had any power to devise the said real estate, and claims to be entitled to the said real estate as her heir-at-law.

The questions for the opinion of the Court are:—

1. Whether the plaintiff is entitled, as against the defendants, to the lands and tenements comprised in the lease to Charles

Miller of the 11th of December, 1873, after the expiration of that lease, and to the other premises the subject-matter of this action.

2. Whether the plaintiff is entitled to the rent received by defendants in respect of the premises comprised in the said lease of the 11th of December, 1873, to Charles Miller since the date of the death of Susannah Mann.

If the Court should answer both questions in the affirmative, then judgment is to be entered for the plaintiff, for a declaration of his title to the said premises, and for 50*l.* for mesne profits, together with the costs of this action.

If the Court should answer both questions in the negative, then judgment is to be entered for the defendants in the action, with costs.

If the Court should answer the first question in the affirmative and the second in the negative, then judgment is to be entered for the plaintiff, for a declaration of his title to the premises comprised in the lease to Charles Miller after the expiration thereof, and to the other premises referred to, and for 20*l.* for mesne profits in respect of the premises not included in the said lease of the 11th of December, 1873, together with the costs of this action.

The Queen's Bench Division gave judgment for the defendants.

The plaintiff appealed.

Charles, Q.C., and *Aspland*, for the appellant.—The question is whether Susannah Mann had power to make this will, and this question depends on the true construction of the document set out in the Case, which, it is to be observed, was not signed by her, but only by her intended husband. Even if an intending husband can, before marriage, bind himself to allow his intended wife to disinherit her heir, still there must be an ante-nuptial agreement to that effect, and no memorandum not executed by the woman can give that power, as is clearly shewn by the judgment of Turner, L.J., in *Field* v. *Moore* (1); and further, this document, if binding, could only include property in possession, it could not include a contingent remainder.

This document, however, was never executed by Susannah Mann, so that it is utterly void and of none effect under section 7 of the Statute of Frauds (2). *Rippon* v. *Dawding* (3) is in point, and may seem to be an authority against the plaintiff; but that case was considered in *Field* v. *Moore* (1), and, as there explained, it does not conflict with the argument on behalf of the plaintiff in this case.

[FRY, L.J., referred to *Wright* v. *Cadogan* (4).]

There cannot be a settlement of property to the separate use of a wife without the creation of trust, so that the 7th section of the Statute of Frauds comes into operation. *Hulme* v. *Tenant* (5) was cited.

Barber, Q.C., and *Wills*, for the defendants.

[BRETT, M.R.—We think that the question raised on the Statute of Frauds is the important question.]

A separate use for the benefit of the wife was here created, and she could therefore devise the property by her will—*Taylor* v. *Meads* (6).

[FRY, L.J.—Does a separate use carry with it the right of testamentary disposition?]

A mere renunciation by the husband is sufficient to oust the marital right, and the question to be considered in each case is whether the words used create a separate use, and whether they exclude the marital right of the husband. A woman who marries does not lose the power of testamentary disposition if an estate for her separate use is created by the renunciation of her husband.

[FRY, L.J.—The marriage puts an end to her testamentary power, but leaves her

(1) 25 Law J. Rep. Chanc. 66, at p. 72; 7 De Gex, M. & G. 691.

(2) 29 Car. 2. c. 3. s. 7: And be it further enacted that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

(3) Amb. 565.

(4) 2 Eden, 239; 1 Bro. P.C. 486.

(5) 1 White & Tudor L.C. (5th ed.) 521.

(6) 4 De Gex, J. & S. 597; 34 Law J. Rep. Chanc. 203.

the power of appointment. Then, in order to declare or create a trust, must there not be the concurrence of the persons interested in the fee, and must that not be in writing so as to satisfy section 7 of the Statute of Frauds?]

Hall v. *Waterhouse* (7) decided that a married woman to whom the legal fee of real estate had been devised to her separate use without the intervention of trustees could dispose of the equitable fee by her will during coverture, and a *feme covert* acting with respect to separate property is competent to act in all respects as a *feme sole*—*Hulme* v. *Tenant* (5). No particular form of words is required to vest property in a married woman to her separate use, and a declaration by the husband, such as is found here, will suffice—*Stanton* v. *Hall* (8) and *Tyrrell* v. *Hope* (9).

[Fry, L.J.—Can that declaration be made by a person who has not the fee?]

The Statute of Frauds does not apply to this case, for there is no declaration of trust by the woman, only a renunciation by the man. A separate use can be created without a trust. In this case the husband renounces his interest; that leaves the woman free to act as a *feme sole*; his right is excluded, and then her right is unfettered.

[Fry, L.J.—Can the husband's renunciation affect others besides himself?]

If the Court should decide against the defendants on this question, then there arises a question as to whom the rents for three years should be paid. *Pride* v. *Bubb* (10) was cited.

Charles, Q.C., in reply. — *Taylor* v. *Meads* (6) dealt with the right of a married woman to dispose of property confessedly settled to her separate use; but here there is no property so settled; and as she is while under coverture incapable by statute of disposing of real property by will, her heir has, in fact, an interest and right in that property—*Willock* v. *Noble* (11). In *Hall* v. *Waterhouse* (7) the real estate was in the heir, and it only passed to the devisees by the operation of a trust; but if there is any trust in this case, it has been declared by a person who had no power to declare it. In *Pride* v. *Bubb* (10) there was a duly acknowledged deed, and the only question was whether the statute applied to contracts as well as to conveyances; but here the first necessary step has never been taken: there has been no settlement such as must be established, there is nothing beyond a renunciation of marital right.

[Fry, L.J.—In *Rippon* v. *Dawding* (3) there was no signature by the wife.]

The point must have been overlooked, as that decision was based on cases such as *Wright* v. *Cadogan* (4), in which the wife had signed the document. *Field* v. *Moore* (1) shews that renunciation after marriage is not sufficient, and it cannot have a greater effect if given before marriage.

Strathmore v. *Bowes* (12) was cited.

With regard to the second point raised, as to rents received since the death of Susannah Mann, there is nothing in this case to take it out of the general rule that the rent goes with the reversion.

Cur. adv. vult.

Fry, L.J. (on May 30), delivered the judgment of the Court, and after stating the facts set out in the Special Case, proceeded:—

In this state of circumstances two questions have arisen.

The first question, which is the only one which was discussed in the Court below, was whether the language of the memorandum signed by Robert Mann, assuming it to be operative, was sufficient to affect and bind the interest by way of remainder in the freehold property, which at the date of the memorandum was contingent and not in possession.

We agree with the Court below in holding that the language includes every interest taken by the wife in the property then in her possession, and therefore as binding the contingent remainder when it fell into possession by the death of the son.

The second question was whether by the conjoint operation of the memorandum

(7) 5 Giff. 64.
(8) 2 Russ. & M. 175.
(9) 2 Atk. 557.
(10) 41 Law J. Rep. Chanc. 105; Law Rep. 7 Chanc. 64.
(11) 36 Law J. Rep. Chanc. 886; Law Rep. 7 H.L. 580.
(12) 1 White & Tudor L.C. (5th ed.) 446.

and will the devisees took anything or nothing.

It appears to us to be plain that the heir can be deprived of the beneficial interest in the inheritance only in one or other of two ways—namely, by devise, or by the conversion of the heir into a trustee. We will consider subsequently a third way insisted on by Mr. Barber.

By devise, properly speaking, the heir in the present case could not be disinherited, for the ancestor was at her death a married woman, and by the Statute of Wills of Hen. 8. married women are declared incapable of devising lands, and no difference has been made in this branch of the law by the statute of the Queen relating to wills.

A *feme covert* has, properly speaking, no testamentary capacity.

Was the heir converted into a trustee for the nominees or *quasi* devisees of Mrs. Mann? It appears to us that the fee simple of a wife may be affected by a trust for her separate use in one of three ways—(1) by conveyance to a trustee, or a declaration of trust by the wife before marriage, if made with the husband's consent; (2) by an agreement between the intended husband and wife before marriage, and (3) by an acknowledged assurance by a wife after marriage.

Now in the present case there was, in our opinion, an agreement in fact between the husband and wife before marriage upon the terms of the memorandum signed by Mann, and we are of opinion that that agreement would have been a sufficient declaration of trust of the fee, but for the fact that the wife never signed the memorandum, and for the provisions of the 7th section of the Statute of Frauds, which enacts that all declarations or creations of trusts of any hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

We conclude that there is no evidence on which the Court can proceed of the existence of an ante-nuptial agreement settling the fee to the separate use of the wife.

But then it was argued that the memorandum signed by the husband was a sufficient declaration of trust by him to create a separate use of the fee. It is, however, obvious that no man can create a trust of an estate which he does not possess, or of any larger estate than he possesses; that the husband did not possess the fee, but only an estate during the joint lives of himself and his wife, with a possible estate by the curtesy; and consequently that, however valid his declaration might be as regards the interest he had, it could not bind the fee which he had not.

Furthermore, Mr. Barber urged us to hold that the mere renunciation by the husband of his marital rights was sufficient to clothe the wife with a testamentary power, or to constitute a valid declaration of trust of the fee.

As to the first of these propositions, no authority was produced for it, and it appears to us to be entirely contrary to principle. The effect of marriage on a woman is, or was, to give certain rights to the husband over her property, and to suspend during the coverture the testamentary capacity which she previously possessed. These effects are entirely independent of one another. This incapacity to devise real estate does not arise from the husband's interest in her property, and consequently cannot be cured by his renunciation of interest. It was admitted that a *feme covert* has no power with the consent of her husband to make a will of real estate; and there appears to us no distinction between consent and renunciation in this case.

The suggestion that the renunciation of the husband can create a valid declaration of the fee has, in fact, been already dealt with; a husband who has not the fee cannot by renunciation of his rights bind the fee.

The only authority in any way in conflict with the views which we have expressed appears to be the case of *Rippon* v. *Dawding* (3), where the Lord Chancellor Camden undoubtedly treated as creating a valid trust of the fee an ante-nuptial agreement, in respect of which it is at least doubtful whether it was evidenced by any writing of the wife.

But the point arising on the Statute of

Frauds was not raised in the case, and the doubt expressed by Lord Justice Turner in *Field* v. *Moore* (1), as to the sufficiency of the evidence of the agreement in *Rippon* v. *Dawding* (3), probably refers to this want of a writing signed by the wife.

A third question was raised from the terms of a lease made by Mr. and Mrs. Mann to a Mr. Miller, and duly acknowledged by Mrs. Mann. It was contended that the terms of this instrument were sufficient to make it operate as a valid post-nuptial settlement perfected by an acknowledged assurance of the rents payable under the lease. It appears to us, however, that the terms relating to the separate use of Mrs. Mann refer only to her life, and consequently have no operation on the rents which accrued after her death.

On the whole, therefore, we conclude that the heir was not disinherited by devise or trust, and consequently that the judgment below must be reversed, and the plaintiff must recover the lands in question, with costs in the Court below. But as the plaintiff did not argue in the Court below the point on which he has succeeded here, there will be no costs of the appeal.

Appeal allowed.

Solicitors — Field, Roscoe & Co., agents for Gardner & Sons, Rugeley, for plaintiff; Burton, Yeates, Hart & Burton, agents for E. M. Beloe, King's Lynn, for defendants.

1884. June 24. } WELDON *v.* RIVIERE.

Husband and Wife—Married Women's Property Act, 1882—*Assault before the passing of the Act—Coverture—Right to sue alone—Practice.*

The Married Women's Property Act, 1882, *does not enable a married woman to bring an action for an assault committed upon her during coverture before the passing of the Act without joining her husband.*

Action for damages for assault. Writ issued on the 1st of September, 1883.

The statement of claim (in which the plaintiff was described as a married woman) alleged that the defendant, on the 29th of October and 6th of November, 1879, did assault and cause the plaintiff to be assaulted and forcibly ejected out of and from the Covent Garden Theatre.

Defence (*inter alia*). — The defendant will object that the plaintiff has no cause of action against the defendant, on the ground that at the times of the alleged assaults and of the accruing of the causes of action sued on the plaintiff was and still is a married woman, the wife of one W. H. Weldon, who is still alive.

Holl, Q.C., for the defendant, in support of the objection, contended that the assault was alleged to have been committed prior to the passing of the Married Women's Property Act, 1882, and therefore at a date when Mrs. Weldon could not have sued without her husband; and that, although the Act of 1882 gave married women power to sue by themselves in such cases for the future, it did not give them power to do so when the cause of action had occurred before the passing of the Act.

The plaintiff appeared in person.

MATHEW, J.—The decision of the Court must be in favour of the defendant. The plaintiff has brought an action in her own name for assault, and the question arises whether she has any right to recover damages in respect of any assaults committed before the passing of the Married Women's Property Act, 1882. I am of opinion that the statute does not give her any such right. Her husband must be joined in the action.

DAY, J. — I entirely agree with my brother Mathew. The husband ought to have been joined in this action.

Judgment for the defendant on the points of law raised by the pleadings.

Solicitors—Dod & Longstaffe, for the defendant.

[IN THE COURT OF APPEAL.]

1884. June 12, 13. THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT *v.* THE UNITED TELEPHONE COMPANY (LIMITED).*

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—*Street Vested in Local Authority—Property of, in Air above Street—Right of to restrain Wire from being carried over Street — Wire causing no Nuisance or Danger—Telegraph Acts*, 26 & 27 *Vict. c.* 112, 31 & 32 *Vict. c.* 110, 32 & 33 *Vict. c.* 73.

The plaintiffs, a local authority, in whom a street was vested and under whose control and management it was placed by 18 & 19 *Vict. c.* 120. *s.* 96, *sought for an injunction to restrain the defendants from carrying telephone wires diagonally across the street at the level of the chimneys, the owners of the houses not objecting, and the wires causing neither nuisance nor appreciable danger:*—Held, *that the plaintiffs were not entitled to the injunction sought for; for they had, on the principle laid down in* Coverdale *v.* Charlton (48 Law J. Rep. Q.B. 128), *only such a limited statutory property in the street, both with regard to depth below and height above the surface of the street, as was necessary for their control of and for the safe and convenient user of the street, and that as the wires caused neither nuisance nor appreciable danger there had been no infringement of their right.*

Appeal by the defendants from the judgment of Stephen, J., given on further consideration after trial without a jury.

Action by the Board of Works for the Wandsworth district against the United Telephone Company for an injunction to restrain the defendants from placing or retaining any wire or wires across certain streets being highways under the management and control of the plaintiffs, and alleging that the defendants had so placed wires without the consent of the plaintiffs, and that they were dangerous to persons using the streets.

STEPHEN, J., on further consideration, delivered the following judgment on the 13th May:—This case was argued before me, and I reserved my judgment on account of the importance of the points involved in it. The facts are as follows: The United Telephone Company is a joint stock company, not incorporated by any private Act of Parliament. They lately erected for a private person in Putney a telephonic wire connecting two of his places of business in Putney, and supplied it at each end with proper telephonic apparatus. The wire and instruments are the property of the company, and are maintained by them, their use being regulated by a contract between them and their customer. The wire is attached, at eleven different points, to chimneys, and is carried at several places for a considerable distance over highways in the district. At one place it passes over the High Street of Putney at a very obtuse angle, its height from the ground being about thirty feet, and its total length from the point of attachment on the east side to the point of attachment on the west side, and thence to a third point of attachment on the east side, being 430 feet, or 143 yards or thereabouts, the greater part of which is over the street.

The plaintiffs are the Wandsworth Board of Works, and by the Metropolis Management Act of 1855, 18 & 19 Vict. c. 120. s. 96, all streets being highways are vested in them and are under their management and control. The action was for an injunction to restrain the defendants from retaining the wire, without their consent, in the position in which it was placed. They put their case on three distinct grounds. In the first place, they contended that the defendants were a company subject to the provisions of the Telegraph Act of 1863, 26 & 27 Vict. c. 112. s. 12, and were as such forbidden to place a telegraph over or along or across a street or public road, except with the consent of the body having the control of it. In the second place, the plaintiffs said that, as owners of the soil, they had an absolute right to prevent the defendants from suspending wires over their road, upon the principle that the air above the road was as much theirs as the road itself. In the third place, the plaintiffs said that the overhead wire was in fact a

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

nuisance to the road, exposing the persons using it to danger.

The first of these arguments turns upon the construction of the Telegraph Acts, and was put as follows:—The Telegraph Act of 1869, 32 & 33 Vict. c. 73. s. 2, is incorporated with the Telegraph Act of 1868, 31 & 32 Vict. c. 110. The Telegraph Act of 1868, 31 & 32 Vict. c. 110. s. 2, is incorporated with the Telegraph Act of 1863, 26 & 27 Vict. c. 112. Therefore the Telegraph Act of 1869 is incorporated with the Telegraph Act of 1863. But in the Act of 1869, "telegraph company" is defined to mean any company, corporation, or person for the time being engaged in transmitting, or, by any instrument incorporating the same, authorised to transmit, telegrams within the United Kingdom, and in *The Attorney-General* v. *The Edison Telephone Company* (1) it was held that a telephonic message is a telegram. Therefore the telephone company is a telegraph company within the Act of 1869. Therefore it is a company under the Act of 1863, and therefore the 12th section of that Act applies to it.

To appreciate this argument it is necessary to look at the objects of the three Acts. The Act of 1863 is an Act intended principally to abbreviate the legislation respecting telegraph companies authorised by Parliament, by providing a general construction to be applied to each special case by reference, in the same way as the Lands Clauses Acts and the Railways Clauses Acts fulfil a similar purpose for other classes of companies. The Act of 1868 gives the Postmaster-General all the powers of a telegraph company under the Act of 1863, and enables him to purchase, on terms set forth in the Act, the undertakings of telegraph companies. The Act of 1869 gives the Postmaster-General a monopoly of telegrams (which has been held to include telephonic messages), and makes provisions in reference to certain contracts and purchases then effected or in negotiation, and no doubt this Act would operate to restrain the defendants from sending telephonic messages if they had not been licensed to do so by the Postmaster-General; but it does not put private companies for telephonic purposes into the position of telegraphic companies authorised by Parliament; on the contrary, the short result of all the Acts read together is to make the Postmaster-General the only telegraph company in England (exceptions excepted), and to give him all the powers for the erection of telegraphs which were by the Act of 1863 intended to be conferred on private telegraph companies incorporated by private Acts. The defendants are simply a joint stock company, licensed by the Postmaster-General to carry on a business from which they would but for his licence be restrained by the Act of 1869. Yet it is clear to me that they have none of the powers of a company under the Act of 1863. The only parts of the three incorporated Acts which apply to them are those which forbid them to carry on their business without a licence from the Postmaster-General, and possibly those which authorise him if he thinks fit to buy their undertaking. I think therefore that the first argument used by the plaintiffs fails.

The second argument is that the effect of the Metropolis Management Act, 18 & 19 Vict. c. 120, is to give them the same right to prevent a wire from being stretched across at any height which a private person would have to prevent such a wire being suspended across his field or garden. This argument depends upon the effect to be given to the words of the Metropolis Management Act, 18 & 19 Vict. c. 120. s. 96. The words are, "all streets being highways, and the pavements, stones, and other materials thereof . . . shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." The interpretation of words almost identical with these has been considered in several reported cases, particularly in *Coverdale* v. *Charlton* (2). This case is recognised, followed, and carefully explained in *Rolls* v. *St. George's Southwark* (3). The words on which that case turned were, "all streets being, or which at any time become, high-

(1) 50 Law J. Rep. Q.B. 145; Law Rep. 6 Q.B. D. 244.

(2) 48 Law J. Rep. Q.B. 128; Law Rep. 4 Q.B. D. 104.

(3) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

ways," &c., "shall vest in and be under the control of the urban authority." They were held both in the Queen's Bench Division and in the Court of Appeal to vest the streets in the vestry in such a sense as to enable them to let the pasturage on a green lane which fell within the definition of a street. The effect of the decision appears to me to be that the words used in the Public Health Act (which in all important particulars are identical with those in the Metropolis Management Act) give to the district board, not merely the control and management of the street, but property in the street itself. Moreover, it decides what is meant by the word "street." Lord Justice Brett says, "'Street' means more than the surface: it means the whole surface and so much of the depth as is or can be used not unfairly for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street—namely, to raise" (the Master of the Rolls, in *Rolls* v. *St. George's Southwark* (3), says this is no doubt a mistake for "pave") "the street and to lay down sewers—for at the present day there can be no street in a town without sewers—and also for the purpose of laying down gas and water pipes. 'Street' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines: neither would 'street' include any buildings which happened to be built over the land, because that is not a part of the street within the meaning of such an Act as this" (4). Lord Bramwell, after minutely construing the language used, concludes thus: "That would shew that 'street' comprehends what we may call 'the surface'—that is to say, not a surface-bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also for doing those things which commonly are done in or under the streets, and to that extent they had a property in it." This limited view of the word "vest" is contrasted, at p. 116, by Lord Bramwell with the wide view in which it may mean that a man acquires the property *usque ad cælum* and to the centre of the earth. It seems to me that the present case must be decided upon the principle here laid down. In the first place, it is to be observed that the case of *Coverdale* v. *Charlton* (2) does not directly decide anything as to the extent of a street upwards. It only limits its extent downwards. It does so, however, upon grounds which seem to me to apply equally in each direction. If it can be shewn that the management and care of the street require some degree of control over the air immediately above it as well as over the ground immediately below it, it seems to follow that the vesting of the street itself in the district board must involve property in part of the air above the surface of the street as well as property in part of the ground below it. Now, it is self-evident that in many cases the air immediately above the street may be dealt with in such a manner as to affect the safety and comfort of the street—as, for instance, if an electric wire passes across the street at such a height as to interfere with traffic. Such a case might be dealt with as a nuisance at common law, but might it not, apart from the law of nuisance, be treated as a trespass on the property of the district board? So long as the wire is at a height which actually interferes with the traffic the question is of no practical importance; but when it is suspended at such a height and in such a manner that though it does not interfere with the traffic of the street, yet it may possibly do so in some extraordinary case, the question becomes one of importance; and in order to illustrate this, I proceed to give my opinion as to the third ground on which the plaintiffs claim their injunction. It is that the overhead wire in question is a nuisance to the highway, and that as such they are entitled to have it removed, apart from the question of property. This, it was agreed, was a pure question of fact. The

(4) In the judgment of Brett, L.J., as reported 48 Law J. Rep. Q.B. 133, the passage runs thus:—"The word 'street' in this Act includes more than the surface; it includes some depth, so much indeed as may be not unfairly required for the ordinary purposes of the street—that is to say, so much depth as is required for the water-pipes, the gas-mains, and the sewer-system.

evidence given on both sides appeared to me to shew that the wire in question is nearly new, that it is properly taken care of, and has been lately examined and found to be in perfect condition, and likely to last for many, or at all events for several, years, without becoming perceptibly weaker than it is now. It causes, and in the common course of things it is likely to cause, no perceptible danger to the public, though it is no doubt possible that a violent storm might blow it down just as it might blow down the chimneys to which it is in most places attached. There was, however, evidence that on two occasions wires of a similar character had in violent storms been blown down in such a manner as to become a source of some danger to persons or carriages passing along the highway. Upon the whole, though I cannot say that absolutely no danger arises from the position of the wire, I do not think, apart from the question of trespass, it would form an indictable nuisance. If it had been erected with the consent of the district board, and had been indicted by some inhabitant of the neighbourhood as a nuisance at common law, I should not have hesitated to direct a jury that there was no evidence of such a nuisance as would justify a conviction.

This being the state of things, the question upon which the case turns appears to me to be whether the street vested in the district board extends to such a height above the ground that the suspension over it is a trespass which entitles them to an injunction. I was at first of opinion that it was not, and that the case resembled the case of *The Wandsworth District Board* v. *The London and South-Western Railway Company* (5). In that case the present plaintiffs applied to Vice-Chancellor Kindersley for an injunction to restrain the South-Western Railway from widening a bridge over a highway called Falcon Lane, vested in the plaintiffs by the same section as the one on which they rely in the present case. There are expressions in his judgment which at first sight look as if he meant to say that, as the vesting of the soil in the district board was purely for the purpose of protecting the convenience of the public, the question to be considered was, whether the way in which they proposed to exercise the rights given to them by the Act would promote the public convenience or not. But this does not appear to me to be the real meaning of the judgment, or, at least, its full meaning. The railway company in that case had power under an Act of Parliament to widen the bridge, and the substantial question appears to have been whether their powers did not authorise the interference by the railway company with the soil of the plaintiffs which was vested in them solely for public purposes. No question was raised as to their right to suspend the bridge across the road. Upon the best consideration which I can give to the present case, it seems to me that Parliament intended to give the district board proprietary rights over the street, including in that word a certain space upwards as well as downwards, in order that the district board might form a judgment as to the expediency, on public grounds, of permitting, or refusing to permit, various acts which, without being actual nuisances in such a sense as to be indictable, might nevertheless be regarded as undesirable innovations. Suppose, for instance, the owner of two houses on opposite sides of the street wished to connect them by a bridge carried at a considerable height over the street, he might inflict no injury at all on the public; but if his right to do so were unconditional so long as he caused no positive danger or diminution of light, others might imitate his example, and the aggregate result might be injurious to the public, though it would be difficult to say at what point the nuisance began. So with regard to telegraph or telephone wires: a single wire may be no nuisance, yet, if no one has a definite right to object in the interest of the public to its erection, such wires might be multiplied to any extent, and might collectively constitute a very appreciable nuisance. I do not suppose that the Legislature, or any member of it, distinctly thought of this when the streets were vested in the district boards, yet I think the object of the enactment was to give the district boards the character of owners in order that they might use for the public convenience rights which a prudent private owner would use in his

(5) 31 Law J. Rep. Chanc. 854.

own interest and in the interest of his tenants. I am strengthened in this view by the provisions of the Telegraph Act, 1863, already referred to. If private persons had at common law a right to suspend wires over the streets, subject only to the general law of nuisance, I do not see why the Legislature should in express words have authorised telegraph companies to do so, as they did by section 6, subsection 2, of 26 & 27 Vict. c. 112, or why they should have compelled them at the same time to obtain the consent of the body having control of the street, as they did by section 12. If they already possessed the power at common law there was no need to give it, though it might have been necessary to qualify it. For these reasons I give judgment for the plaintiffs in the terms of their statement of claim, with costs; but as the case is one of great importance, and will no doubt be carried further, and as I think the wire causes no appreciable actual danger to the highway which it crosses, the injunction is not to issue until after the hearing and final determination of the appeal, if the defendants appeal from this judgment.

The defendants appealed.

Webster, Q.C., *Cozens-Hardy, Q.C.*, and *J. F. Moulton*, for the appellants.—The effect of the judgment of Stephen, J., is that the property in the column of air is vested in the plaintiffs, with whom therefore rested the decision whether the defendants should be permitted to keep the wires where they had been erected. The wires themselves were fixed overhead some thirty feet above the street; and the decision of Stephen, J., did not proceed upon the ground that the wires were so suspended as to create a nuisance or interfere with the traffic in the street. It may be that the plaintiffs are the owners of the column of air so far as is necessary to secure the safety of the traffic and persons in the street; but that question does not arise, for there is no reason to suppose that any possible injury can happen to the public from the wires. No doubt the plaintiffs are owners of the street so far as to entitle them to protect the public from any danger which may arise from things suspended at any height over the street.

The maxim "*Cujus est solum ejus est usque ad cœlum*" does not apply here, for the plaintiffs have no absolute ownership in the soil; their rights extend only so far as is necessary to protect the interests of the public; they are merely guardians of the highway. Under the Metropolis Local Management Act, 1855, the street only is vested in the board, but they have no absolute ownership in the soil. The duty of the board is to protect the public from danger, and if there is no such danger they have no right to interfere. Moreover, here it has been found that there is no danger.

26 & 27 Vict. c. 112. s. 6; the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149, the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 96 (6), 101, 119, 250, *Coverdale* v. *Charlton* (2), *Rolls* v. *The Vestry of St. George, Southwark* (3), *The Wandsworth Local Board* v. *The London and South Western Railway Company* (5), *Pickering* v. *Rudd* (7), *Fay* v. *Prentice* (8) and *Kenyon* v. *Hart* (9) were cited.

Philbrick, Q.C., *T. Wilkinson*, and *R. O. B. Lane*, for the plaintiffs.—The question is, what is the actual property vested in the district board by the Act of Parliament. The language of James, L.J., in *Rolls* v. *The Vestry of St. George, Southwark* (3), when criticising *Coverdale* v. *Charlton* (2), puts the law as it really is—namely, that the board has something more than an easement, and that they have some right of property in and on and in respect of the soil which would enable them as owners to bring a possessory action against trespassers. The depth of soil below the surface which would vest in the board depends very much upon circumstances; but there is an actual right to the surface and to something below it. Assuming that there is a right of property in the

(6) 18 & 19 Vict. c. 120 provides, by section 96, that "all streets being highways, and the pavements, stones and other materials thereof, ... shall vest in and be under the management and control of the vestry or district board of the parish in which such highways are situate."

(7) 4 Campb. 219.

(8) 1 Com. B. Rep. 828; 14 Law J. Rep. C.P. 298.

(9) 6 B. & S. 249; 34 Law J. Rep. M.C. 87.

surface in the board, they also have a right of property in the air above the surface. Section 96 of the Act of 1855 not only vests the streets in the board, but also gives them the control and management of them. The evidence shews there is possibility of danger; but even if there were not, the plaintiffs are entitled to an injunction, as there is no such thing as *bonum vacans* in the air over a street, so that the whole column of air vests in the plaintiffs, and 25 & 26 Vict. c. 102, which amends the Metropolis Management Act of 1855, provides, in section 98, that streets shall be open at both ends "from the ground upwards," and thus prohibits any occupation of any portion of the air.

[FRY, L.J.—It may be that the plaintiffs have absolutely the whole column of air, or it may be that the statute vests in them the area of the street reserved for the user of the street, or it may be that it does more and vests in them all the area necessary to prevent any possible interference with the user of the street.]

The last suggestion is that contended for by the plaintiffs, and these wires interfere with that area, for the word "vests" carries with it everything necessary for the proper and convenient use of the street.

[FRY, L.J.—The plaintiffs claim the zone or area of safety above and below the zone or area of user?]

Yes; and the judgment of Bramwell, L.J., in *Coverdale* v. *Charlton* (2) points to such a meaning being given to the word "vest"; so that the plaintiffs are in law the owners of everything below and above the actual street which can possibly be in any way necessary for their control of the street as a street, regard being had to the convenient and safe user of it.

Further, the defendants cannot place a telegraph-, and that includes a telephone-, wire over the street without the consent of the plaintiffs, even though no nuisance, danger or inconvenience is caused thereby, because 32 & 33 Vict. c. 73. s. 2, incorporates the provisions of 31 & 32 Vict. c. 110, which itself incorporates 26 & 27 Vict. c. 112, so that 32 & 33 Vict. c. 73 is incorporated with 26 & 27 Vict. c. 112, which enacts that "The company shall not place a telegraph over . . . . a street . . . . except with the consent of the body having the control of such street."

[FRY, L.J.—Is that veto repeated and extended to companies not incorporated by that Act?]

This company is, by the 32 & 33 Vict. c. 73, made a telegraph company within 26 & 27 Vict. c. 112, in which the provision as to consent is found.

Cozens-Hardy, in reply.—26 & 27 Vict. c. 112 only applies to companies incorporated with Parliamentary powers, to companies therefore which have privileges which this company does not possess, and subject to limitations which do not attach to this company.

BRETT, M.R.—This case depends on the true construction of the statute 18 & 19 Vict. c. 120. s. 96, when considered with reference to the circumstances of this case. Those circumstances are, that a telephone-wire is affixed to the chimneys of certain houses in a certain street, and passes diagonally across the street. The owners of the houses in the street do not object to these wires, and the question is whether the local board of works can object to these wires because they pass over the area of the street which is vested in them by the Metropolis Management Act, 1855, so as to enable them to obtain an injunction against the company. The solution of that question must depend on the construction to be placed on the section which vests the streets in the local board. I do not doubt but that an injunction ought to be granted if the local board shew that the existence of the wires is a nuisance, or if the existence of the wires in that position causes danger to the street. But whether this is so or not must be a question of evidence. There was in this case evidence on both sides; but there was certainly strong evidence that these wires, put up in the condition and in the manner in which they have been put up, are not a cause of danger to the street, and the learned Judge before whom this case was tried has found that no appreciable danger is to be apprehended from these wires at present, or for a considerable time to come; and I do not think that there is any reason for our dissenting from that view so that the result is that there is no danger

in law or in fact, that the wires do not interfere with the use of the street as a street, and therefore that there is no ground on which an injunction ought to be granted, unless it is established that a trespass has been committed on that which is actually the property of the district local board. Mr. Justice Stephen considered that such a trespass had been committed, and he therefore gave judgment for the plaintiffs. I am unable to adopt this view, and therefore I think that this appeal must be allowed. The plaintiffs are a local board, they acquire the property in these streets by virtue of a statute, and they have no property in them except that which they derive from that statute. The statute which confers the property on them is the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), the same statute which was under consideration in the case of *Rolls* v. *The Vestry of St. George, Southwark* (3). This statute is expressed in section 96 in terms similar to those found in the Public Health Act, 1875, an Act which was considered and construed in the case of *Coverdale* v. *Charlton* (2), so that a question arises in this case similar to that which arose in that case. In *Coverdale* v. *Charlton* (2), this Court had to consider what meaning ought to be given to the words "shall vest in and be under the control of" the local authority, and Lord Justice Bramwell gave in that case a judgment which shews that he thought that the word "vest" gave the local authority so much property in the grass which grew upon the surface of the street that the local authority could pass an interest in that grass to some one else. I considered that the word "vest" passed so much property to the local authority as to enable them to do with the street that which any other owner might do, so long as they did not commit a breach of their duty to the public for whose benefit the Act vested the street in them. I considered that the subject-matter of the enactment being property in the street, that property vested in the local authority in the same way in which property vests in other persons; but it was not necessary in that case to decide whether the property vested in the local authority for ever. In *Rolls* v. *St. George's Southwark* (3), it became necessary to consider what was the length of the existence of that right of property, and this Court considered that the streets vested in the local authority only so long as they were streets. I may say that I agree with that decision, and that I consider that the property in a street passes under this Act to the local authority only so long as the street remains a street. I also think that the word "street," as used in this statute, means more than a right of way, and includes more than the surface on which persons walk. It is clear from the report of *Coverdale* v. *Charlton* (2) in the *Law Reports* that Lord Justice Bramwell was not without doubt; but I think that his final judgment is found on page 118, where he said, "that would shew that 'street' comprehends what we may call the surface—that is to say, not a surface-bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it;" and this view is borne out by the report of the *Law Journal Reports*, where he is reported, at page 131, to have said, "on the whole I think that the word 'street' includes so much of the surface, and so much of the thickness or depth, as is usually needed for the ordinary works which the local authority would need to execute in or upon a street"—so that the property which passes is, with regard to the depth, that amount of property which has been called the area or zone of user—that is, of ordinary user, such as is usually required for the ordinary works which are carried on in a street. That seems to me to agree with what I said in that case when I stated that "'street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines; neither would 'street' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act

as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of owners to the soil in a 'street' is of so little value, intentionally taken away that right, and have given it, to the extent I have mentioned, to the local board."

It seems to me that the basis of the judgment in *Coverdale* v. *Charlton* (2), as to the depth of street which is vested in the local authority, is that a construction had to be put upon a statute in which the word used was "streets" and not "land," that the word was used in a popular and not in a technical sense, so that a meaning had to be given to such a word both with regard to depth and with regard to the width between the houses, and the meaning given was a meaning which covered the area of ordinary user as existing at the time, and nothing more. That case, therefore, contains a principle, and that principle is an authority binding upon us in this case, and I think that that decision was and is right, that the principle was correctly enunciated, and that the interpretation adopted in that case is the true interpretation of the statute. The word "street" therefore means and includes the area ordinarily used as a street. There was not in *Coverdale* v. *Charlton* (2) any decision in express words as to the height above the surface which would be included in the word "street," and it has been urged in this case that that word passes, in respect of height, everything *usque ad cœlum*. I do not intend to question what was said by Lord Coke as to the effect of a conveyance or grant of land, and I do not desire to say that in such a case everything down to the centre of the earth or *usque ad cœlum*, to use the common phrases, does not pass. But that is so because, by the common law of England, when the word "land" is used, a conveyance with that description in it does carry with it all that is implied in those phrases; and it does not follow that if the word used is "street," and if a "street" is vested in some person or body, the same consequences follow, even though there is a grant or a conveyance. Here, however, there is no grant, no conveyance; there is a statute, and the object of that statute, and subject-matter which is dealt with in that statute, must be considered. The statute deals with a street which exists for the public, and such a street includes, as far as depth is concerned, the area of ordinary user of the street, when considered as a street. With regard to height, I do not think it is possible to measure the height included in the word "street" so used with any precise accuracy; but, applying the principle to which reference has so often been made, I think that one may say that the tops of the chimneys are not part of the street, considered as including the area of ordinary user of the street as a street. The statute, it must be remembered, does not give to the local authority any property in that which covers the street, but only in that which is in the street itself; so that I am of opinion that no property in the air in which these wires were placed passed by virtue of this statute to the local authority, and therefore these wires were not placed in or did not pass through that which was the property of the local board. I think Mr. Justice Stephen extended the principle of *Coverdale* v. *Charlton* (2) too far, and that this appeal must be allowed.

With regard to the argument urged on behalf of the respondents, that their consent was required under 26 & 27 Vict. c. 112, I agree with Mr. Justice Stephen that the contention fails. It seems to me that it is an attempt to apply an interpretation clause used in one Act to a prohibition contained in another Act, and that the words "any company" used in 32 & 33 Vict. c. 73 are not the same in effect as the words "the company" used in the earlier Act.

BOWEN, L.J.—I have no doubt that if it had been shewn that there was appreciable danger to the street, to the public, or to the traffic, the Court would grant an injunction; but no such question as that is raised in this case. The real question before us is whether, when there is no appreciable danger and no nuisance, a local authority in whom a street is vested by 18 & 19 Vict. c. 120. s. 96, can, under that Act, practically veto the putting up of wires such as have been put up by the defendants in this case. The question there-

fore is, whether the plaintiffs, the local authority, have such a property vested in them as will enable them to interfere with wires so placed as to cause no danger to or interference with the street or the traffic. If the local authority simply owned the land, or if the land had become vested in them by means of an ordinary conveyance, I should be loth to suppose that the owner of such land could not object to interference with his property by any one who put anything over his land at any height whatsoever. But in this case there is no conveyance of land, nor is there any transfer of property in the ordinary sense of the term, for that which the local authority take they take only by virtue of the provisions of the statute to which I have referred. Two rules should, I think, be borne in mind in this case—first, that we ought to construe the section, taking words which are used in a popular sense in that sense; and, secondly, that if there are two possible constructions of the words so considered, we ought, I think, to adopt that construction which is based on the theory that the Legislature only gave such powers as were necessary to enable the local authority to carry out the objects of the statute, and that we ought not to presume that the Legislature intended to confer upon the local authority any larger powers than were necessary.

This Act of Parliament is dealing with a street as a material, physical thing. It does not deal with a mere easement over a street, but with the street itself, in the sense already stated. Now the word "vest" may apply to any kind of property transferred to or made to reside in some person, and the section which we are considering might be considered as giving the local authority something analogous to a common law freehold interest in the soil, or it might be considered as giving to them such a special statutory interest in the soil as would enable them to carry out the purposes of the statute.

It seems to me that the case of *Coverdale* v. *Charlton* (2) decides one thing in plain terms, but that the authority of the case extends beyond the actual decision. The case itself decided that the Public Health Act, 1875, the phraseology of which is almost entirely identical with that used in the section now under consideration, vested in the local authority such a statutory property in the surface and soil of the street as to justify their possession of the surface and to enable them to demise the pasturage; but that decision leaves open the question of what is the extent of the property and right so given to them. I am not sure that all the three Judges took the same view as to this. I will not refer further to what was said in that case by Lord Justice Bramwell and the present Master of the Rolls; but it seems to me that Lord Justice Cotton considered that whatever was the nature of the statutory property which passed, it was enough to enable the local authority to transfer the property in the grass which grew upon the surface of the street. In the case of *Rolls* v. *St. George's, Southwark* (3), the question arose as to the duration of the right so given, and Lord Justice Cotton in his judgment states what he considered was actually decided in the earlier case of *Coverdale* v. *Charlton* (2); and Lord Justice Thesiger, referring to *Coverdale* v. *Charlton* (2), said, "The effect of that case is substantially this: that section 96 has given to these bodies, over and above the mere easement of passage which the public possess, and over and above the right and control of management of the roads which the old surveyors of highways possessed, some right of property, some possessory right, which would enable the district boards or the vestries to maintain actions in respect of that property or possessory right; and the decision of the Court does not seem to have gone one step beyond that." And the whole Court considered that the statutory interest given in that case was sufficient to prevent any other person from taking possession of the surface without the sanction of the local authority. It was not necessary in *Coverdale* v. *Charlton* (2) to say to what depth or to what height the street as dealt with by that Act extended, so that I do not think the actual expressions which were necessary for the decision of that case conclude this case; but I think that the principle of that case is in point here, and it seems to me that the word "street," as used in this section, covers all the area or zone of the ordinary user of

the street considered as a street. It seems to me that a statutory interest of a proprietary character in the surface of the street and in what is below the surface of the street is granted to the local authority so as to enable them to protect the street and the traffic; and with regard to the air above the street I think that the local authority has no interest in the space above and over the street beyond that which is necessary to enable them to exercise the powers given to them by the statute for the protection of the street and the traffic.

I would add that I do not desire to infringe upon the doctrine referred to by the Master of the Rolls, and embodied in the maxim "*Cujus est solum ejus est usque ad cœlum.*" I do not think we have to deal with that question in this case, for what the local authority has here is a defined and limited interest in the street, but it has not an absolute and unqualified interest in the land.

With regard to the second point raised, as to the consent of the local authority being required under certain statutes before these wires can be put up, I agree with the Master of the Rolls that that contention cannot be supported. Concurring, therefore, in allowing this appeal, I would repeat that our judgment is no authority for the proposition that the Court would not interfere if there were shewn to be either nuisance or appreciable danger.

FRY, L.J.—The injunction sought for in this case has been asked for on three grounds. It has been urged that these wires were in fact and law a nuisance; that they were an invasion of the proprietary right of the plaintiffs; and that the consent of the plaintiffs to their erection, which is said to be required by statute, had not been obtained.

With regard to the first point, I see no reason to differ from the judgment of Mr. Justice Stephen, that no nuisance or appreciable danger has been proved. The second point depends on 18 & 19 Vict. c. 120. s. 96, which provides "that the streets being highways, and the pavements, stones and other materials thereof, shall vest in and be under the management and control of the vestry or district board." I think it is clear that the object of this section was to give to the local authority something more than the mere management of the street, for the street is "vested in" the local authority; but as the word "street" is a popular word used in a popular conception, it is somewhat difficult to say what the area is and what the quality of the estate is which is thus vested in the local authority. If the matter were unaffected by authority, it might be that I should have inclined to think that the statute had intended to vest in the local authority everything beneath and above the superficies vested in them; but that contention has not been urged before us, because it would be inconsistent with *Coverdale* v. *Charlton* (2), where this Court put a construction on a statute containing almost the very same words, and that decision of course binds us in this case. There is in a street as ordinarily used an ordinary area or zone of user, and below that there is another area or zone which if used in a certain way might endanger the ordinary area of user, as if beds of coal contained in it were worked out so as to endanger the surface of the street; and in the same way there is an area or zone above the ordinary area of user which might be used in such a way as to interfere with the ordinary user of the street. Did the Legislature then intend to vest these areas or zones of possible interference in the local authority? It seems to me that the *ratio decidendi* of *Coverdale* v. *Charlton* (2) was that the Act only vested the street in the local authority so far as the area of ordinary user extended; that nothing more was given to the local authority, and that the area of possible interference was excluded. We are therefore bound by that definition of the word "street" which seems to me to have been given, certainly by Lord Justice Bramwell and the present Master of the Rolls; and the result of that judgment is that the area of possible interference in the subjacent soil does not pass to the local authority. That judgment did not deal in express terms with the similar area above the street; but the principle of the decision applies, and I do not think we ought to attempt to depart from that principle.

The definition given in *Coverdale* v. *Charlton* (2) confers upon the local authority a proprietary title of a certain kind in the area of ordinary user, and it confers nothing more. Now the wires which are the cause of complaint in this action are not placed in that area, and that seems to me to be decisive against the claim of the plaintiffs. I express no opinion, and certainly no doubt, as to the rights of the ordinary proprietors of land: that question is not raised by this case, although as at present advised I am of opinion that an ordinary owner of land may deal with wires placed above his land at any height, as being an infringement of his proprietary right; but, as I have said, it is not necessary to decide this question; nor is it necessary to decide what would be the rights of an adjoining proprietor who owned the subsoil beneath the area of ordinary user.

I think that the third argument urged by the plaintiffs cannot succeed, for I am unable to think that every company which is for the purpose of the monopoly created by the Act of 1869 brought within that Act, is thereby brought within the provisions of the Act of 1863 as to consent and veto. I think, therefore, that the judgment appealed from must be reversed, inasmuch as it extended the principle of *Coverdale* v. *Charlton* (2) too far in applying it to the area of possible interference instead of only to the area of ordinary user.

Appeal allowed.

Solicitors—Corsellis, Son & Mossop, for plaintiffs; Waterhouse, Winterbotham & Harrison, for defendants.

1883. Dec. 11, 18. } THE QUEEN *v.* THE WEST BROMWICH SCHOOL BOARD.

Poor—Rate—Rateable Value—Occupier under Restrictions—School Board.

[For the report of the above case, see 53 Law J. Rep. M.C. 67.]

1884. May 22, 23. } VALLANCE *v.* FALLE.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 172, *&c.—Penalty—Withholding Seaman's Certificate—Compensation—Right of Action apart from Statute.*

The Merchant Shipping Act, 1854, *ss.* 172 *and* 524, *imposes a penalty not exceeding* 10*l. upon any master of a ship who fails to sign and give a certificate of discharge to a seaman specifying the period of his service and the time and place of his discharge, such penalty to be applied, if the Justices think fit, in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed.*

The plaintiff, a seaman, brought an action against the defendant, a master of a ship, for damages sustained through the defendant's withholding a certificate of discharge:—Held, *that the action was not maintainable, inasmuch as the duty was created for the first time by* 17 & 18 *Vict. c.* 104. *s.* 172, *and a particular remedy was conferred by that statute.*

This was an appeal from the decision of the Judge of the Weymouth County Court under the following circumstances:—The plaintiff, a seaman belonging to the ship *Brighton*, of which the defendant was master, brought an action to recover damages, laid at 25*l.*, for improperly withholding and detaining from the plaintiff for a long time—namely, from the 29th of April, 1882, to the 21st of March, 1883—a certificate of discharge and character to which the plaintiff was entitled on the termination of his articles and his leaving service on board the *Brighton*, whereby he was unable to obtain employment.

The action came on for trial in the County Court of Weymouth on the 20th of September, 1883, and was tried without a jury. Before witnesses were called, the defendant's solicitor, for the purpose of raising the question of jurisdiction, admitted withholding the certificate by defendant, but objected that there being no common law duty or obligation imposed upon the master of the vessel to give such certificate of discharge before the passing of the Merchant Shipping Act, 1854 (17 & 18

Vict. c. 104), and that statute having by section 172 imposed a penalty of 10*l.* for such withholding, a common law action could not be maintained, the plaintiff's remedy being confined to the penalty; and that therefore the County Court had no jurisdiction.

The County Court Judge held that the action could not be maintained, and that the plaintiff's remedy was confined to the penalty imposed by section 172, and such compensation as the Justices before whom the case would have to be heard had the power to give under the provisions of the 524th section, and ordered a non-suit to be entered.

The plaintiff appealed (1).

Francis Turner, for the appellant.—The fact of the imposition of a penalty by statute for breach of duty does not prevent the plaintiff bringing an action to recover any special damage he may have suffered from the defendant's neglect. The penalty is applicable to the public wrong only, not for the private damage—*Couch* v. *Steele* (2) and *Wright* v. *The London General Omnibus Company* (3). If the defendant's contention is sound, a seaman might be left altogether without remedy, inasmuch as under section 524, in the absence of any direction by the Justices, the whole penalty will go to the Crown. He also cited 36 & 37 Vict. c. 85. s. 31, *Hurrell* v. *Ellis* (4), *Atkinson* v. *The Newcastle Waterworks Company* (5), *Rogers* v. *Macnamara* (6) and *Beckford* v. *Hood* (7).

Tindal Atkinson, for the respondent.—There is no right of action apart from the statute, which has conferred a particular remedy and given what is considered to be adequate compensation, to be applied, if the Justices think fit, in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which the penalty is imposed. *Hurrell* v. *Ellis* (4) and *Wright* v. *The London General Omnibus Company* (3) are distinguishable; for there the right of action was founded on a common law right of action, and it was decided that such right was not taken away by statute. *Atkinson* v. *The Newcastle Waterworks Company* (5) is a strong authority in favour of the defendant's contention. In that case the penalty was recoverable by a common informer, and it was yet held notwithstanding that there was no right of action apart from the statute. The decision in *Couch* v. *Steele* (2), though not actually overruled, was strongly questioned by the Court of Appeal in *Atkinson's Case* (5). He also cited *Stevens* v. *Jeacocke* (8).

STEPHEN, J.—I am of opinion that the judgment appealed against must be affirmed.

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 172, provides as follows: "Upon the discharge of any seaman or upon payment of his wages, the master shall sign and give him a certificate of his discharge, in a form sanctioned by the Board of Trade, specifying the period of his service, and the time and place of his discharge; and if any master fails to sign and give to any such seaman such certificate of discharge, he shall for every such offence incur a penalty not exceeding ten pounds; and the master shall also, upon the discharge of every certificated mate whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding twenty pounds."

By section 518, sub-section 3, every offence made punishable by a penalty not exceeding one hundred pounds shall be prosecuted summarily before Justices.

By section 524: "Any Court, justice, or magistrate imposing any penalty under this Act, for which no specific application is herein provided, may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings; and, subject to such directions or specific application as aforesaid, all penalties recovered in the United Kingdom shall be paid into the receipt of her Majesty's exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the consolidated fund of the United Kingdom; and all penalties recovered in any British possession shall be paid over into the public treasury of such possession and form part of the public revenue thereof."

(2) 3 E. & B. 414; 23 Law J. Rep. Q.B. 121.
(3) 46 Law J. Rep. Q.B. 429; Law Rep. 2 Q.B. D. 171.
(4) 15 Law J. Rep. C.P. 18.
(5) 46 Law J. Rep. Exch. 775; Law Rep. 2 Ex. D. 441.
(6) 23 Law J. Rep. C.P. 1.
(7) 7 Term Rep. 620.
(8) 11 Q.B. Rep. 731; 17 Law J. Rep. Q.B. 163.

Vallance v. *Falle.*

The case has been argued with great care, and I do not think it is necessary to go through all the authorities. It appears to me that the general rule is sufficiently clear—namely, that you must look at the terms of the statute and see whether its provisions meant to confer a general right, to be the subject, if necessary, of an action, or whether there exists only a particular duty to be enforced by a particular remedy. Now the duty is imposed by section 172 of the Merchant Shipping Act, 1854, upon masters of giving seamen certificates of discharge, and if any harm is done to such seamen by the neglect of the employer to do what is required, a straightforward remedy is given, by which a sum not exceeding 10*l.* may be recovered, the whole or part of which penalty may be applied for the benefit of the seamen. When the terms of the statute are looked at, the rights of the parties seem to me to be defined in a very straightforward manner. As I have said, the intention of the Legislature must be regarded in construing a particular statute, and the cases which have been relied upon by Mr. Turner seem to me to be clearly distinguishable. In *Beckford* v. *Hood* (7), which was a copyright case, it is obvious that if the penalty imposed by the statute had been held to be the only remedy the value of the copyright would have been totally destroyed. So again in the case of *Atkinson* v. *The Newcastle Waterworks Company* (5), it is clear that the statute never could have intended to make the company gratuitous insurers against fire of the whole town of Newcastle.

So, again, the facts in *Wright* v. *The London General Omnibus Company* (3) seem to me to be clearly distinguishable. In that case the plaintiff chose to avail himself of a summary remedy given by a statute for injuries occasioned by the negligent driving of an omnibus driver in the defendants' employ, and it was held that having done so he could not proceed to recover damages elsewhere. In the present case, having regard to the nature of the certificate and the provisions of the statute, I have come to the conclusion that the only remedy is that pointed out by the statute.

MATHEW, J.—I am of the same opinion. There is not much doubt about the general principles which ought to be applied to a case of this kind, and the observations of Mr. Justice Willes in *The Wolverhampton New Waterworks Company* v. *Hawkesford* (9) are well worth bearing in mind. As that learned Judge points out, there is a class of cases where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. Mr. Turner has argued as if the remedy given by the statute was not the only remedy; but, if that be so, this strange consequence would follow—namely, that the seaman might institute proceedings, and having recovered the full penalty under the Act, might then bring his action for damages. The duty is created by the statute for the first time, and the Legislature might well have considered that 10*l.* was a sufficient remedy. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—Coode, Kingdon & Cotton, agents for J. H. Joliffe, Crewkerne, for plaintiff; Wainwright & Baillie, agents for R. N. Howard, Weymouth, for defendant.

[IN THE COURT OF APPEAL.]

1884. May 26, 27, 28.

THE QUEEN (*on the prosecution of the Assessment Committee of the Poplar Union, respondents*) *v.* THE EAST AND WEST INDIA DOCKS COMPANY (*appellants*).

Poor — Rating — Quinquennial Valuation—Supplemental Valuation—Alteration — Preceding twelve months — Evidence — Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 46 *and* 47.

[For the report of the above case, see 53 Law J. Rep. M.C. 97.]

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(9) 28 Law J. Rep. C.P. at p. 246.

[IN THE HOUSE OF LORDS.]

1884. March 21, 24. GRANT AND COMPANY *v.* COVERDALE, TODD AND COMPANY.

Shipping—Charter-party—Construction of—Demurrage—Frosts preventing Loading.

By a charter-party it was agreed that a ship should proceed to Cardiff East Bute Dock and there load from the agents of the freighters a cargo of iron; the cargo was to be supplied as fast as steamer could receive at all hatchways; "time to commence from the vessel being ready to load . . . . and ten days on demurrage over and above the said lay days at 40l. per day (except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading; . . . in which case the owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship)."

The ship arrived in dock and commenced loading; but subsequently canals through which part of the cargo had to pass became blocked with ice, and in consequence a stoppage occurred of five days in the loading. The frost would not have prevented the loading had the cargo been ready at the dock, but the cargo could not have been brought to the dock otherwise than by the canals without unreasonable expense:—

Held, *that there was no frost "preventing the loading" within the exception, and that the charterers were liable for demurrage.*

This was an appeal from a decision of the Court of Appeal which reversed one of Pollock, B. The case is reported in the Courts below, Law Rep. 8 Q.B. D. 600; 11 Q.B. D. 543.

At the trial before Pollock, B., without a jury, at the Swansea Summer Assizes, 1881, all matters of fact were referred to a special referee to report, who found, so far as is material, as follows:—

By a charter-party dated the 16th of December, 1880, it was agreed between the plaintiffs and defendants that the steamer *Mennythorpe* should proceed to Cardiff East Bute Dock and there load in the customary manner a cargo of 1,800 tons of bar or bundle iron.

"Cargo to be supplied as fast as steamer can receive at all hatchways for loading, and to be discharged as fast as customary with steamers. Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l.* per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading, in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship)."

Of the 1,800 tons 400 were to be supplied by the Llynfi Company, who have a wharf on the East Bute Dock, 400 by the Dowlais Company, who have a wharf on the West Bute Dock, which communicates by a canal with the East Bute Dock, and the remaining 1,000 tons by Messrs. Crawshay, who have a wharf on the Glamorganshire Canal, from which there is a junction canal to the East Bute Dock.

The *Mennythorpe* arrived in East Bute Dock on the 10th of January, 1881, and took on board the Llynfi and Dowlais Companies' iron by the 13th. On the 13th frost set in, and the passage of lighters through the canals from Crawshays' wharf became impassable from the 16th to the 21st. On the 21st loading was resumed and completed by the 3rd of February.

The dock itself was not frozen over, and if the cargo could have been brought there no substantial delay would have been caused by the frost. It was not reasonably possible to bring the iron from Crawshays' wharf by land carriage, nor could the charterers have obtained, and loaded the ship with, a like cargo from any other place or by any other means. The referee found, as a fact, that the delay in loading was caused by the frost alone.

The action was brought by the shipowners for demurrage and damages for detention. Pollock, B., held that the frost delayed the loading within the meaning of the exception in the charter-party, and gave judgment for the defendants.

The Court of Appeal, following their

own recent decision in *Kay* v. *Field* (1), held that the case was not within the exception.

The defendants appealed.

Webster, Q.C., and *Moulton* (*Bowen Rowlands, Q.C.*, with them), for the appellants. —It is contended that this case is distinguishable from *Kay* v. *Field* (1), and that the decision in *Kay* v. *Field* (1) is wrong. If the frost, whether in the dock or elsewhere, actually delayed the loading, it is within the exception; just as the exception of strike of hands must apply to a strike anywhere, not merely to a strike of dock hands. This view is confirmed by the fact that the shipowner has the exceptional privilege of being allowed to take a short voyage during the delay—*Hudson* v. *Ede* (2). The exceptions were much more limited in *Adams* v. *The Royal Mail Steam Packet Company* (3), *Fenwick* v. *Schmalz* (4), and *Kearon* v. *Pearson* (5). The reasoning in *Postlethwaite* v. *Freeland* (6) should be applied to the circumstances of this case.

Tapscott v. *Balfour* (7) was also referred to.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Brynmôr Jones*, for the respondents, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—I believe that none of your Lordships have any doubt that the order appealed from in this case ought to be affirmed. The whole question, of course, depends upon the terms of the charter-party; and the material terms are these: On the part of the shipowner it is agreed that the ship "shall (after discharging her cargo at Middlesborough) with all convenient speed sail and proceed to Cardiff East Bute Dock, or so near thereunto as she may safely get, and there load always afloat in the customary manner from the agents of the freighter a full and complete cargo of about 1,800 tons of iron." That is the shipowner's contract. The charterer contracts on his part: "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." (I omit what relates to unloading and discharge.) "Time to commence from the vessel being ready to load and ten days on demurrage over and above the said lay days at 40*l.* per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading.)"

Now the exception has reference to the loading and nothing else. It is important to observe, with respect to any argument founded on the particular accidents enumerated, frosts, floods, or hands striking work, to which large general words are superadded, that those are in a printed form, and are meant therefore to suit each particular case as far as they can, but they are not introduced in contemplation of any particular case, this or any other. But the mention of "Cardiff East Bute Dock" is a part of the special terms of this particular contract, not of the printed form; it is manifest, therefore, that those words must be applied *reddendo singula singulis* according to the circumstances which may in point of fact be applicable to the particular case in the special contract—you cannot found upon any one of them an argument of this sort, that it must of necessity have been introduced with reference to the particular place and the particular circumstances of that place.

With that observation I proceed to notice that it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not in any degree absolve him from the consequences of keeping the ship too long. That was decided, under circumstances very similar in many respects, in the case of *Kearon* v. *Pearson* (5), and decided expressly on the ground, as was pointed out,

(1) 52 Law J. Rep. Q.B. 17; Law Rep. 10 Q.B. D. 241.
(2) 36 Law J. Rep. Q.B. 273; 37 ibid. 166; Law Rep. 2 Q.B. 566; 3 ibid. 412.
(3) 5 Com. B. Rep. N.S. 492; 28 Law J. Rep. C.P. 33.
(4) 37 Law J. Rep. C.P. 78; Law Rep. 3 C.P. 313.
(5) 7 Hurl. & N. 386; 31 Law J. Rep. Exch. 1.
(6) 49 Law J. Rep. Exch. 630; Law Rep. 5 App. Cas. 599.
(7) 42 Law J. Rep. C.P. 16; Law Rep. 8 C.P. 46.

I think, by all the learned Judges, certainly by my noble and learned friend here present (Lord Bramwell), by Mr. Baron Wilde, and by Lord Chief Baron Pollock, that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing.

This exception in the contract being limited to "accidents preventing the loading," the only question is, what is the meaning of "loading"? and whether this particular frost did, according to the facts, prevent the loading. There are two things to be done—the operation of loading is the particular operation in which both parties have to concur. Taken literally, it is spoken of in the early part of this charter-party as the thing which the shipowner is to do. The ship is to "proceed to Cardiff East Bute Dock," "and there load the cargo." No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation —everything before that is the charterer's part only. It would appear to me to be most unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation, which are no part whatever of it, and which are perfectly distinct from it, but which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board; and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be; they mention "strikes, frosts, floods, and all other unavoidable accidents preventing the loading." If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfilment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance or to be brought by sea, or to put it on the railway or bring it in any other way in which it is to be brought; all those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time; but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word "loading"? Are those things any part of the operation of loading? Nothing, I suppose, is better established in law with regard to mercantile cases of this kind than the maxim, "*Causa proxima, non remota, spectatur*"; and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute Dock can make no difference whatever in principle if it was not the place of loading. If the cargo had to be brought from this wharf on the Glamorganshire Canal however near it was, if it had to be brought over a passage which in point of fact was impeded, and over which it was not brought, to the place of loading, to say that the wharf on the Glamorganshire Canal was, upon a fair construction of the words, within the place of loading, appears to me to be no more tenable than if the same thing had been said of a place a mile higher up the canal where, according to the actual contract, the persons were to supply the iron, and where

the owner of the iron might have been found.

That really is quite enough to dispose of the whole argument. The case of *Hudson* v. *Ede* (2) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission in point of fact of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as, for instance, that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And of course if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded in the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact cargo not only could be, but actually had been, brought up by carts to the East Bute Dock and put on board ship; and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you are to look at the interest of the charterer; but if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it, whatever the cause of his not doing it may be, whether it be his not being willing to incur an unreasonable expense, or whether it be any other cause.

Under these circumstances I think that your Lordships can have no hesitation in affirming the judgment appealed from, and I move your Lordships to do so with costs.

LORD WATSON.—I am of the same opinion. This vessel had reached her destination at the East Bute Dock, and thereupon it became the duty of the charterer to load the vessel, that is to say, to bring the cargo either to the wharf or by means of lighters to the vessel's side and to put it on board her. The exception which he pleads is an exception in his favour, upon the obligation thus incumbent upon him, and it is for him to shew that it extends to the case which he now maintains. I am of opinion that it cannot be so extended. I think that in this case "loading" means loading in the East Bute Dock, and I am not prepared to assent to a construction of this charter-party which would imply that the word "loading" had as many different meanings as there happened to be different merchants or manufacturers of iron rails in Cardiff who happened to select a different locality in order to store their iron for the purpose of shipment.

LORD BRAMWELL.—I am entirely of the same opinion. Whether, if these parties had met and talked over the possibility of frost preventing the passage of the iron from Crawshays' Wharf to this ship, or down the Glamorganshire Canal to Crawshays' Wharf, or any other conceivable difficulty arising from frost—whether in that case the shipowner would have agreed to bear the risk of it, the charterer bearing none of the risk of it, is more than I can say. It is utterly impossible to speculate upon such a thing as that—all that we can do is to deal with the particular words that they have used, as to which it is very likely that neither of them had in their minds any definite meaning. But the words to my mind are tolerably plain—they relate entirely to something which prevents the loading, that is to say, the actual putting on board of the cargo, and I think, when you couple that with the expression in the earlier part of the charter-party, that the vessel is to "proceed to the East Bute Dock, or so near thereunto as she may safely get, and there load," the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented.

Grant v. *Coverdale, H.L.*

LORD FITZGERALD.—I also concur. One of the terms of the contract itself was performed, the ship arrived in due course at Cardiff East Bute Dock, the place of loading according to the contract, where she was, in the language of the contract, "to load in the customary manner from the agents of the freighter a full and complete cargo of about 1,800 tons." "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." "Time to commence from the vessel being ready to load." "Demurrage over and above the lay days at 40*l.* per day, except" *inter alia* "in case of frosts preventing the loading." There is another provision, which is not undeserving of attention, "steamer not to require to load before 9th of January." It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all the risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage could have arisen.

Order appealed from affirmed; and appeal dismissed, with costs.

Solicitors—Clarke, Rawlins & Co., for appellants; Shum, Crossman, Crossman & Prichard, agents for Turnbull & Tilly, West Hartlepool, for respondents.

1883. Dec. 17. } THE QUEEN *v.* MANNING AND ANOTHER.

Conspiracy — Indictment against two Defendants—Conviction of One Defendant only — Practice — Misdirection — Setting aside Verdict.

[For the report of the above case, see 53 Law J. Rep. M.C. 85.]

[IN THE COURT OF APPEAL.]

1884. July 14. } WHEELER *v.* THE UNITED TELEPHONE COMPANY.*

Practice—Payment into Court—Alternative Defences—Rules of Court, 1875—*Order XXX. rule* 1.

Every payment of money into Court by a defendant to an action is a payment into Court under the Judicature Acts and the rules made under those Acts, and is a payment into Court by way of satisfaction of the cause of action in respect of which it is paid in. A defendant, therefore, who both pays money into Court, and sets up other defences to the same cause of action, is entitled to judgment in the action, if he succeeds in respect of the payment into Court, even though he fails on the other defences which he has set up.

Appeal from the judgment of Williams, J., on further consideration, after trial with a jury.

Action to recover damages for trespass in breaking and entering the plaintiff's land and erecting telegraph poles thereon.

The defence denied that the land was in the possession of the plaintiff, justified under leave and licence from one having a paramount title, and further pleaded that, without admitting any kind of liability, the defendants brought into Court the sum of 5*l.*, and said that it was sufficient to satisfy any damages the plaintiff might have sustained.

The plaintiff joined issue.

At the trial the plaintiff established his title to the land; the defendants failed to prove their justification; but the plaintiff also failed to prove any damages beyond the sum paid into Court.

Williams, J., being of opinion that the plaintiff had succeeded in establishing the liability of the defendants, that the defendants had failed to establish any complete defence to the action, or any defence to the further maintenance of the suit within any of the statutes authorising such a defence, and that they had only succeeded upon a secondary issue as to the quantum of damages, held that the plaintiff was entitled by law to the judgment

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

of the Court for 5*l.*, and that the defendants were entitled to their costs of the issues upon which they had succeeded.

The defendants appealed.

J. F. Moulton, for the appellants.

Fillan, for the respondent.

Goutard v. *Carr* (1), *Berdan* v. *Greenwood* (2), *Coughlan* v. *Morris* (3) and the Rules of Court, 1875, Order XXX. (4), were cited.

BRETT, M.R.—The substantial question in this case is, whether this Court is prepared to give a decision opposed to that which it gave a short time since in *Goutard* v. *Carr* (5). I have seen a manuscript copy of the report, prepared for the *Law Journal* of the judgments delivered in that case, and

The cause was then referred to arbitration, and one of the terms of the reference was that the costs of the action and of the award should abide the event. I shall, in the first place, deal with the case as though there had been no such reference, and consider what the result would have been if it had been tried in the ordinary way by a Judge and a jury, and what in such a case would be the legal effect of the payment into Court in the manner adopted in this case, and with the expressions used by the defendant in these pleadings. It is said by the appellant that payment into Court is the plea or defence under Order XXX. of the Rules of Court of 1875, and that it is a defence going to the whole right on which the plaintiff brings his action. It is said by the respondent that Mr. Justice Williams, at chambers, adopted the view that this particular payment into Court does not have the same effect as if payment into Court had been made in a different form of pleading and with other forms of expression. I still maintain the opinion entertained by Lord Justice Thesiger, and expressed by him on behalf of both himself and myself in *Berdan* v. *Greenwood* (2). It is true that what was there said was not so necessary to the decision of that case as entirely to conclude us on the present occasion; but still those expressions were carefully chosen and deliberately stated, and they formed the real ground for our opinion that the statement of defence in that case was not embarrassing. After this argument I remain of the same opinion; I think that money cannot be paid into Court except by virtue of and under the rules of Court—that was, at the time when this payment was made, by virtue of Order XXX. rule 1. If this case does not come within the provisions of that Order, then this money was paid into Court and received by the officer of the Court without any legal authority at all; such a payment would be futile and would have no legal effect. It is not possible that this can be the case; it may be that the expressions used by the defendant were not the best; but even if that be so, still the mere form of the pleading cannot matter, the question is as to the legal effect of the pleading used. I do not myself think that the form of the expression used was wrong, it is only equivalent to an alternative defence; but if money is paid into Court under Order XXX., it must be paid in by way of satisfaction or amends, and in the present case it was paid into the whole cause of action, and was therefore paid in satisfaction of the whole cause of action.

The defendant has in this case pleaded other defences, but *Berdan* v. *Greenwood* (2) shews that he can do so; and it seems to me that he has only exercised a right given him by the Judicature Act and the Rules of Court of pleading payments into Court in satisfaction of the cause of action, and at the same time of plead-

(1) *Ante*, p. 55.

(2) 47 Law J. Rep. Exch. 628; Law Rep. 3 Ex. D. 251.

(3) Irish Rep. 6 Com. Law, 405.

(4) The rules which were in force when Williams, J., gave this judgment were the Rules of Court, 1875, Order XXX. rule 1—"Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein." This rule has now been repealed, and Order XXII. of the Rules of Court, 1883, contains the rules which now govern payment into Court.

(5) The facts of the case of *Goutard* v. *Carr* to which reference is made are set out *ante*, page 55, and the judgments which were then delivered on the question of payment into Court were handed to the Court on the argument of this case, and, being referred to in the judgment of the Court, are given here as setting out fully the opinion of the Court on this point.

BRETT, M.R.—In this case the plaintiff sues CARR—for, for the purpose of this judgment, I eliminate Bloxam from the case—to recover damages, and nothing else, in respect of an alleged trespass.

The plaintiff's right to recover depends on a right of property, perhaps on a custom, and on the question whether Carr had committed the alleged trespass, and whether the plaintiff had suffered any damage at all in consequence of that trespass. These being the circumstances, the defendant denied every step of the plaintiff's claim and of his title to recover any damages at all, and he then went on in a particular form to pay money into Court in respect of the alleged damage.

it appears to me to be a correct report of the judgment of this Court. I began my judgment in that case by saying that I should consider the case as though it had

ing other alternative and distinct defences. Mr. Justice Williams seemed to think that this form of defence and form of payment into Court prevented the plaintiff from having a right to take the money out of Court; but that cannot be so, unless it can be said that the payment was not made and the defence not pleaded by way of satisfaction.

There is no authority which lays it down that a plaintiff cannot in such circumstances take out money so paid in. Mr. Justice Williams appears to have thought that this payment was not made by way of satisfaction or as a defence. But I am unable to agree with that view; as, if that were the case, there would be no authority for paying the money into Court, and it would be an idle payment. Such a payment must therefore be a payment under Order XXX. rule 1, and must, in consequence, be a payment in satisfaction and by way of defence, so that a plaintiff can take out the money so paid in. At the trial of this cause (if this cause had been tried out) all the issues would have been tried and found in favour of the plaintiff, with the exception of the issue whether the sum paid into Court was sufficient; that issue would have been found for the defendant, and judgment would then have been entered for the defendant, as he succeeded on an issue which went to the whole root of the cause of action. Then when the costs came to be taxed, it would appear that the plaintiff had succeeded on several issues, and he would have the costs of those issues, while the general costs of the action would be allowed to, and judgment entered for, the defendant.

In this case the cause was referred, and the arbitrator has found all the issues but one in favour of the plaintiff; he has also found that the sum paid into Court was more than sufficient to meet the damages claimed, that is, to satisfy the only remedy asked for by the plaintiff.

The event of the award is therefore in favour of the defendant, so that on taxation of costs the general costs of the cause are costs to be allowed to the defendant If the word "event" in the agreement to refer is equivalent to events, and if therefore we are enabled to consider all the separate issues, then the result would be that the costs would be taxed as if the same findings had been arrived at after a trial by a jury, and the plaintiffs will be entitled to the costs of the issues on which they succeeded, while the general costs of the reference will be allowed to the defendant. So that the question is whether the plaintiff has by this agreement of reference entitled himself to say that he can claim the costs of the issues on which he has succeeded, and on that point we will reserve our judgment. Mr. Justice Williams gave by his judgment the general costs of the cause to the plaintiff, and the Divisional Court upheld that judgment. With this view I am unable to agree, because I do not agree with the fundamental proposition on which that judgment is based, which was that the expressions used in the statement of defence prevented this payment into Court from being a payment into Court by way of satisfaction. I think that this part of the defence was, if proved, a complete defence to the action, and therefore I am of opinion that this appeal must be allowed. With regard to the remarks of Lord Justice Cotton in *Berdan* v. *Greenwood* (2), I would add that I think that if an action is brought for an injunction or a declaration of right as well as for damages, payment into Court can only be made in respect of the claim for damages, so that no question as to an injunction or a declaration of right arises with respect to or when considering a defence of payment into Court.

BAGGALLAY, L.J.—It appears to me that if this action had been brought on for trial in the ordinary way the judgment in *Berdan* v. *Greenwood* (2) would shew how the case must be treated. Lord Justice Thesiger there said, "The only remaining alternative is that of the plaintiff succeeding in establishing his cause of action, but failing to prove any damage beyond the sum paid into Court, or to establish any title to relief other than in damages." That appears to me to be the exact case here. The judgment then proceeds, "in that event the issues upon the record will be duly found in accordance with the event, and will sufficiently explain themselves; the general judgment will be for the defendant, and unless the Judge otherwise orders, pursuant to rule 1, Order LV., the defendant will recover the general costs of the cause, while the plaintiff will be entitled to the costs of the particular issues found in his favour." It has been urged that those remarks were really *obiter dicta*, and that observation may, to a certain extent, be true, as the question we decided in that case was whether an alternative pleading was embarrassing; but the decision in *Berdan* v. *Greenwood* (2) was approved of in *Hawksley* v. *Bradshaw* (6), where Lord Justice Bramwell expressly said that he adopted that case "and the reasoning upon which it is founded." In the present case we have to consider a reference to an arbitrator containing a provision that the costs of the cause, reference, and award were to abide the event. Alternative defences were raised; the arbitrator found for the plaintiff on the question of title and obstruction to the ditch, and found against him on the question of special

(6) 49 Law J. Rep. Q.B. 333; Law Rep. 5 Q.B. D. 302.

been tried by a Judge and a jury, and as though there had been no arbitration. I then said that where under the Rules of Court made under the Judicature Acts payment

damage, for he found that the damage done was less than the amount of money paid into Court. Applying then the principle of *Berdan* v. *Greenwood* (2), the defendant would in this case be entitled to the general costs of the award, and to all costs other than the costs of the issues on which the plaintiff succeeded. I am unable to concur in the view expressed by Mr. Justice Williams at chambers, or with the reasoning on which he divided payments into Court into three branches. It appears to me that under the Judicature Act money paid into Court is paid in under Order XXX. rule 1, and that it is money which the plaintiff can take out under rules 3 and 4 of that order, and that if it were not so paid in it would not be paid in under any order at all. The appeal must therefore be allowed.

BOWEN, L.J.—I am of the same opinion. There was in this case a reference; the question of costs was dealt with by agreement, and it was settled that they should follow the event of the arbitration. The arbitrator was put in the place of a jury, but no discretion as to costs was given to him. The question is, what is the event of a verdict in a case where the defendant denies the title of a plaintiff in such a case as this, and at the same time pays money into Court with a statement of defence worded as this statement of defence is worded. The history of payment into Court is summarised briefly in *Berdan* v. *Greenwood* (2), and I think the recapitulation of that history clears the ground. Till comparatively recently payment into Court was not dealt with upon the record, and the formal treatment of it is considerably later in date than the formal treatment of the question of leave to plead several matters. Such pleadings were dealt with by the statute of 4 Anne, c. 16. s. 4, but not until 3 & 4 Will. 4. c. 42 was payment into Court noticed on the record. Then the rules of Hilary Term, made pursuant to that statute, regulated payment into Court, and it was settled that a payment into Court so made and so pleaded was an admission of a cause of action. It was at that time impossible for a defendant to pay money into Court and at the same time to deny all the plaintiff's cause of action in respect of the matters to which the money was paid in.

Then came the Common Law Procedure Act, 1852, which dealt with this subject in sections 70 and 71. Section 70 provides that, with certain exceptions, the defendant may pay into Court "a sum of money by way of compensation or amends." Section 71 directs how such payment shall be pleaded, and the form given says that the "sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to." Section 84, which deals with pleading several matters together, does not include payment into Court.

In 1875 the Judicature Act altered the rule of the Common Law Procedure Act under which payment could only be made in the prescribed manner and by way of meeting the further maintenance of the plaintiff's action; and Order XXX. rule 1 of the Rules of Court, 1875, deals with payment into Court in satisfaction, and is equivalent to, though different from, section 71 of the Common Law Procedure Act, 1852. If the two be compared it becomes clear, I think, that under Order XXX. the defendant cannot pay money into Court unless the payment is to be taken to be a bar to the further maintenance of that part of the cause of action of the plaintiff in respect of which it is paid in; and if the defendant makes a payment into Court, it must be done in his defence and by way of defence to the claim of the plaintiff, or else it will not be allowed to be contained in the statement of defence at all. Rule 3 of the same Order provides for payment out of money so paid in, and is confined to money paid in under rule 1, and I believe that ever since the practice has been inveterate to treat all payments into Court as payments made under Order XXX., and that practice seems to be in conformity with the old practice. The Rules of Court made under the Judicature Act dealt both with payment into Court and with the question of pleading several matters, and altered the law as to both, and I think it not unlikely that there was an undesigned concurrence between the rules on these two subjects, so that then for the first time it became possible to pay money into Court and at the same time to traverse the plaintiff's cause of action, and a practice of doing so sprang up under the Judicature Act.

Mr. Justice Williams divides payment into Court into three branches, which he states to be, "First, where a defendant as in former times confesses a certain claim, and brings into Court a sum of money ready to be paid to the plaintiff as sufficient to satisfy the plaintiff's claim. Secondly, where the defendant, denying entirely liability and disputing every part of the cause of action, says in the alternative that he is nevertheless willing, for the sake of peace, to pay to the plaintiff in full satisfaction of his claim, if he is willing to accept it as such, a certain sum of money, which he brings into Court ready to be paid to the plaintiff, and says that it is fully sufficient to satisfy the plaintiff's claim. Thirdly, where the defendant denies his liability and disputes every part of the cause of action, and says in the alternative, while denying the plaintiff's right, that if, contrary to what the defendant believes and contends, the plaintiff should establish his right, the defendant brings into Court a certain sum and says that it is sufficient to satisfy the plaintiff's claim."

is made into Court, it is paid in in satisfaction of that part of the claim to which it is paid in. If there is more than one defence, it is allowed as an alternative defence; and if it is one of several defences, and the defendant only proves that defence, then he succeeds on that defence, even though he fails on the other defences which he has set up, and even though he has to pay the expenses of those defences on which he has failed. Whatever form of words is used in the defence by which money is paid into Court, the substance of the matter is that the money paid in and the defence set up is, according to the Judicature Acts and the Rules of Court, an alternative defence, if the money is paid in or the defence set up with other defences. If the judgment of the Court is in favour of that defence, then it seems to me it is as though under the old system the verdict and judgment had passed in favour of the defendant on one plea, although the judgment and verdict passed for the plaintiff on the other pleas pleaded by the defendant to the same cause of action, so that of those pleas he has to pay the costs, but on the one on which he succeeds he is entitled to judgment and to his costs. That was the foundation of the judgment of this Court in *Goutard* v. *Carr* (5). There is no distinction between that case and this, unless it be in the form of words used, and this case is governed by the decision of this Court in that case.

BOWEN, L.J.—I am of the same opinion. It is too late to ask us to depart from the principle of the decision in *Goutard* v. *Carr* (5). We decided in that case that where money is paid into Court and received by the Court, that is a payment into Court under the Judicature Act, and that it is intended to follow the course prescribed in Order XXX. If not, the payment would be incomprehensible, as it would be useless for a defendant to pay money into Court at all. The result of the decision in *Goutard* v. *Carr* (5) is that a mere informality in the form of the defence, or a mere divergence from the proper form, does not operate to destroy the only possible effect of the payment of money into Court.

FRY, L.J.—I am of the same opinion. I think that the case of *Goutard* v. *Carr* (5) governs this case, and decides that a payment into Court is equivalent to an admission of liability on the part of the defendant in respect of the cause of action to which it is paid, and there is nothing to prevent that principle from applying here. The argument for the respondent really turned on a question of construction of the form of the words of the defence. I think the principle is wide enough to govern all cases in which the words used

I am unable to see any justification in principle for this distinction, and I think that it is not possible ever to pay money into Court except under Order XXX. rule 1. What object indeed could any defendant have for paying into Court money in any other way? It would not further his defence; it would be to lock up the money so paid without any corresponding advantage. The decision in *Berdan* v. *Greenwood* (2) supports our judgment, although perhaps it was not so material to the decision in that case as to conclude us now, but it is quite clear that this Court then considered the law to be as we are now laying it down. Lord Justice Cotton seems to have assumed in that case, that in an action which was only an action for damages, in which the defendant pays money into Court, the plaintiff may on such payment consider the object of the action, and if he does by the action establish a right, then that the Judge may make a declaration as to the right, and so give to the plaintiff the costs. But I must say that I do not think a defendant can pay money into Court except in answer to an action claiming damages or a debt, and that if in such an action the plaintiff who has made no claim for an injunction or for a declaration of right does proceed with his action after payment into Court, he does so at his own risk. It may be that at the hearing of the cause the plaintiff may apply to mould or alter the pleadings and his claim, but I do not think that the plaintiff has any right to treat the trial as anything but a trial of his claim, although of course the Judge can deal with the costs as justice requires. I agree with the judgment delivered by Lord Justice Thesiger in *Berdan* v. *Greenwood* (2); and if that judgment were not sufficient, then we find that in *Hawksley* v. *Bradshaw* (6) the Court approved of the decision in *Berdan* v. *Greenwood* (2), and both Lord Justice Bramwell and Lord Justice Baggallay adopted the reasoning of the judgment in the former case; so that the weight of authority is against the view taken by Mr. Justice Williams at chambers, and with the judgment to which I have referred my own opinion agrees.

Judgment accordingly.

are not inconsistent with the admission of liability of which the payment into Court is potent evidence.

Appeal allowed.

Solicitors — Hatchett-Jones & Letcher, for plaintiff; Parker & Ponsford, for defendants.

[IN THE COURT OF APPEAL.]

1884. July 4. MITCHELL v. THE DARLEY MAIN COLLIERY COMPANY.*

Right of Support—Injury caused by Interference with—Successive Subsidences caused by one Excavation—Cause of Action—Statute of Limitations, 21 *Jac.* 1. *c.* 16. *s.* 3.

The plaintiff owned the surface of certain land under which the defendants had worked the coal down to, but not since, 1868. *In* 1871 *part of this surface subsided, and the plaintiff's houses were thereby injured. The defendants then, by agreement, repaired the injured houses. In* 1882 *a fresh subsidence took place, although the defendants had not worked the coal since* 1868, *nor had they done anything whatever under the plaintiff's land since that date. This subsidence caused injury to certain other houses belonging to the plaintiff, and he brought an action to recover damages for the injury so caused. The defendants relied on the Statute of Limitations, alleging that the cause of action accrued in* 1871, *when the first subsidence took place:*—Held, *that the plaintiff was entitled to recover, for that the subsidence causing damage was the cause of action, that each fresh interference with the plaintiff's right to support which affected the enjoyment of his property gave rise to a fresh cause of action, and therefore that the plaintiff's claim, which was based on the subsidence in* 1882, *was not barred by the Statute of Limitations.*

Lamb v. Walker 47 Law J. Rep. Q.B. 451) *overruled.*

Whitehouse v. Fellowes (30 Law J. Rep. C.P. 305) *approved.*

Appeal from the judgment of Hawkins, J., at the trial without a jury.

Action for damage arising from subsidence which was caused by excavations made by the defendants in working coal under the land of the plaintiff.

Defence, *inter alia*, that the excavations which caused the subsidence were made more than six years before action brought.

The plaintiff was the owner of land and houses under which the defendants worked the coal. They ceased to work the coal in 1868, and soon after that the land subsided and injured certain houses of the plaintiff; the defendants then, by arrangement with the plaintiff, repaired the damage caused by that subsidence. In 1882 another subsidence took place, and other houses of the plaintiff were injured. No fresh excavation had been made and no further working had been carried on since 1868, the mine had not been touched by the defendants, and had been left in the condition in which it was in 1868. The plaintiff brought this action to recover damages for the injury caused by the new subsidence.

Hawkins, J., gave judgment for the defendants, holding that he was bound by *Lamb* v. *Walker* (1).

The plaintiff appealed.

Wills, Q.C., and *C. Ellis*, for the appellant. — This appeal is, in fact, an appeal against the judgment of the majority of the Queen's Bench Division in *Lamb* v. *Walker* (1); and the contention of the appellant is that the judgment of Cockburn, C.J., who dissented, lays down the correct view of the law. Each fresh subsidence which causes damage gives a fresh cause of action. The defendants have caused a state of things to exist which may any day gravitate into a fresh cause of action, and each cause of action only covers the damage which has at the time of action brought been caused. The excavation under the land of the plaintiff is not in itself a wrongful act, and therefore no right of action accrues until damage is

Coram Brett, M.R.; Bowen, L.J., and Fry, L.J.

(1) 47 Law J. Rep. Q.B. 451; Law Rep. 3 Q.B. D. 389.

caused. *Backhouse* v. *Bonomi* (2) does in fact destroy the reasoning on which the judgment in *Nicklin* v. *Williams* (3) was based, and that case can no longer be considered an authority.

Whitehouse v. *Fellowes* (4) is inconsistent with *Nicklin* v. *Williams* (3), and is to be preferred; it applies to this case because there is no distinction between the continuing act done in that case, and a continued removal of support or a continued omission to support such as is found in this case. The plaintiff is therefore entitled to sue for damages caused by the fresh subsidence; and even though the subsidence which occurred in 1882 was caused by the old excavation which was made more than six years ago, still the plaintiff can sue for each fresh injury caused by each fresh subsidence.

Forbes, Q.C., for the defendants.—The principles laid down in *Nicklin* v. *Williams* (3) have received the sanction of the House of Lords, to this extent at all events, that no second action can be brought for damage caused by the same excavation as that which caused the earlier injury, and on this point the judgment of Mellor, J., in *Lamb* v. *Walker* (1) is express. *Whitehouse* v. *Fellowes* (4) does not resemble this case, for there was an allegation in that case that the defendants had created a nuisance, were continuing that nuisance, and were dealing with it. If the view contended for by the appellant is adopted, the practical inconveniences which will result are forcibly pointed out in *Lamb* v. *Walker* (1).

[BOWEN, L.J., referred to *Gillon* v. *Boddington* (5).]

Wills, Q.C., in reply, cited *Smith* v. *Thackerah* (6) and *Clegg* v. *Dearden* (7).

BRETT, M.R.—The plaintiff in this action owns the property on the surface, while the defendants own the mines under that property. In 1868 the defendants worked out the seam of coal which lay under and supported this surface, so that, shortly after, the surface, the support of which had been thus interfered with, subsided to some extent, and certain cottages belonging to the plaintiff were injured. The defendants repaired those cottages, and it seems to me that what then took place was equivalent to compensation paid by the defendants and accepted by the plaintiff, just as though an action had been brought and damages awarded. It is not alleged that any further damage has been done to the property of the plaintiff by that subsidence. If indeed the earth had not again moved there would have been no further injury; but in consequence of something which was done, or an omission by the defendants to do anything, a fresh subsidence of the land took place after an interval. The plaintiff alleges that this new subsidence has caused him appreciable injury, and he now brings his action to recover damages for that injury. The objection is taken that the action is brought too late, inasmuch as it is brought more than six years after the first subsidence; and it is urged that when the arrangement to which I have referred was made, the plaintiff could have, and ought to have, recovered prospective damages for all the injury that might thereafter accrue from subsidence. The answer on the part of the plaintiff is that the defendants caused his land to subside in 1868, and that, by arrangement with the defendants, that cause of action was settled; but now the plaintiff alleges that the defendants have again caused his land to subside, and that this subsidence is a new subsidence. The plaintiff admits that what the defendants did was lawful so long as they did not cause his land to subside; but he says further that the cause of the new subsidence is the old excavation and the omission on the part of the defendants to fill it up or to give support to the surface. It is urged that this is a new injury, and that it is no answer to an action for this new injury to say that the *causa causans* of this new injury is the same as the *causa causans* of the former injury.

What then is the real cause of action in such a case as this? It seems to me that the case of *Backhouse* v. *Bonomi* (2)

(2) 9 H.L. Cas. 503; 34 Law J. Rep. Q.B. 181.
(3) 10 Exch. Rep. 259; 23 Law J. Rep. Exch. 335.
(4) 10 Com. B. Rep. N.S. 765; 30 Law J. Rep. C.P. 305.
(5) 1 Ry. & M. 161.
(6) 35 Law J. Rep. C.P. 276; Law Rep. 1 C.P. 564.
(7) 12 Q.B. Rep. 576; 17 Law J. Rep. Q.B. 233.

raised that question, and that the judgment of the House of Lords was given on the question put by the House to the Judges; but that question had nothing to do with a case of two successive subsidences resulting from the same excavation. The question was whether the owner of a house injured by workings under it, but the injury to which does not arise till some time after the workings ceased, can bring "an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient," and the answer was that he could bring his action at any time within six years after the mischief was done.

If the excavation is the cause of action because it becomes a wrongful act owing to subsequent subsidence, then the excavation itself must be the cause of action; but the House of Lords did not lay that down, and I think that the excavation is not a wrongful act, and that the excavation is not the cause of action. The subsidence causing injury is the cause of action; and therefore, although the case of *Backhouse* v. *Bonomi* (2) did not decide anything as to cases of successive subsidences, still it follows as a logical result of the decision in that case that independent subsidences are in themselves independent causes of action.

The case of *Nicklin* v. *Williams* (3) was prior to *Backhouse* v. *Bonomi* (2), and I think the later decision shews that the judgment in the earlier case was wrong, although it was not then necessary to overrule it. I think that *Nicklin* v. *Williams* (3) is in point, and that if it is to be upheld we ought to give judgment for the defendants. It is true that it was a decision on demurrer, and that the argument took place on the new assignment that the plaintiffs sued for damages, for that after the repairing mentioned in the plea, and before the action, by reason of the same acts of the defendants which caused the damage in respect of which the agreement was entered into, the land on which the houses of the plaintiff were gave way and the houses were injured. It was there held that the damages claimed in this new assignment were damages claimed in respect of the same cause of action as that with regard to which an agreement had been entered into, and therefore that if the old excavation caused a second subsidence that injury was part of the first cause of action. If, however, the subsidence is itself the cause of action, then in such a case there would be two successive causes of action, and then the judgment in *Nicklin* v. *Williams* (3) cannot be supported. I think that the logical result of *Backhouse* v. *Bonomi* (2) is that *Nicklin* v. *Williams* (3) cannot be considered good law, and that we must now say that it is overruled.

Whitehouse v. *Fellowes* (4) was not a case in which mining operations had to be considered, it was a case in which certain trustees of a turnpike road converted a ditch into a conduit or a covered drain; they kept that drain in a certain condition in a place over which they had certain proprietary rights and certain statutory powers, and the result of the way in which they kept the drain was that water collected and flowed away into a neighbouring colliery. In that case the plaintiff argued that the time of limitation, which was a statutory time, ran from the time the damage was sustained and not from the time the works were done; and the Court held that the *causa causans* was a continuing cause of action and gave the plaintiff a cause of action when the damage was first sustained; and further, that as the defendants kept the drain in that altered condition so that it again injured the plaintiff, the *causa causans* being the same as before, still there was fresh injury and a fresh cause of action when that fresh injury was sustained. Each recurrence of the damage was held in that case to constitute a new injury, and the Statute of Limitations was held to run from the time each cause of action arose. It cannot be doubted that the judgment in that case does conflict with the judgment in *Nicklin* v. *Williams* (3), and I think that the case of *Whitehouse* v. *Fellowes* (4) must be upheld and considered as correctly expressing the law on this subject.

This question was again raised in *Lamb* v. *Walker* (1), where the Court was divided in opinion. It appears to me that the Lord Chief Justice Cockburn reasons out the whole matter afresh in his elaborate judg-

ment, and shews that the cause of action is the subsidence, that that is the only cause of action, and that if the subsidence is caused by the defendant by an act of omission after an act of commission, each subsidence is a new cause of action. I am myself unable to see the answer to the argument of the Lord Chief Justice that it is inconsistent with the true principle to hold that because an owner of land has sustained actual damage to a limited extent from excavation, he can recover in the same action not only in respect of damage actually sustained, but also in respect of prospective damage which has not yet arisen and which possibly never may arise. I think that the reasoning of his judgment is conclusive to shew that each subsidence is in itself a fresh cause of action, that this view is the logical result of the judgment in *Backhouse* v. *Bonomi* (2), and that his judgment is to be preferred to the judgment of Mr. Justice Manisty, and ought therefore to prevail. It seems to me that Mr. Justice Mellor only enquired whether the case was concluded by authority or not. I do not think it is necessary to decide now whether when there is subsidence it is necessary to take into account in one action all the prospective damage which may arise from that subsidence, nor to decide on what principle the damages in this case ought to be assessed. What we do decide is, that although the *causa causans* of successive subsidences is the same, yet where there is a new subsidence which causes injury, then there is a new cause of action; and therefore that in this case the plaintiff is entitled to succeed.

BOWEN, L.J.—This case raises the question whether the judgment of the Lord Chief Justice Cockburn or that of Mr. Justice Manisty given in the case of *Lamb* v. *Walker* (1) is to be preferred. It is, I think, a difficult question, and but for the fact that all the cases on this subject have recently been brought before me and carefully considered by me, I should have desired to take further time to consider my judgment. What is the cause of action, regard being had to the undisputed facts of this case? Is it the old excavation in 1868, or is it the subsidence in 1882, or is it both? The law as to support or the right to support has only been thoroughly discussed in comparatively recent times; and when *Nicklin* v. *Williams* (3) was decided, the true principle upon which this branch of the law must be based had not been arrived at, for it is clear that that case was decided on the ground that the true cause of action was the withdrawal of support and the interference with the plaintiffs' legal right to support. Baron Parke, in delivering the judgment of the Court, said: "We think this action is for an injury to a right, and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the land, coal, or substratum was taken away as to deprive the plaintiffs' land and house, &c., of the support to which the plaintiffs were entitled, a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house or any part of it, or even by part of the structure being cracked or displaced"; and he then distinguishes the case of *Gillon* v. *Boddington* (5) on that ground. It follows from that, therefore, that the plaintiffs in that case were entitled to recover compensation for prospective damage, although it was not clear what the measure of damage was. But the case of *Backhouse* v. *Bonomi* (2) in the House of Lords cuts away the ground on which the judgment in *Nicklin* v. *Williams* (3) rests, for it lays down that the right possessed by the owner of the surface is the right to the ordinary enjoyment of his own land, and the right of support necessary for such enjoyment; so that it follows that he has no cause of complaint until his enjoyment has been interfered with. That case, however, still left open two possible views as to the cause of action. It may be that the real cause of action is the interference with the enjoyment of the property by the subsidence, or it may be that the subsidence and damage done thereby give a colour to a previous act which was not in itself wrongful, but which has in fact caused the subsequent subsidence. My own view is that each fresh interference with the enjoyment of the land is a wrong which gives a new cause of action, and that each successive subsidence creates a further cause of action, as

the Lord Chief Justice Cockburn stated in his judgment in *Lamb* v. *Walker* (1). It may be that this view may lead to nominal damages being recovered in an action if subsidence is proved though no appreciable injury is shewn to follow, and it may be that this view does not quite agree with the view taken in *Smith* v. *Thackerah* (6). I do not feel inclined to say that the case of *Whitehouse* v. *Fellowes* (4) is absolutely irreconcilable with the case of *Nicklin* v. *Williams* (3); but it seems to me that the reasoning in *Whitehouse* v. *Fellowes* (4) applies here, and that it was not only the original excavation but the continued withdrawal of support which gave rise to this injury and to the cause of action. I would refer to the judgment of Lord Chief Justice Cockburn in *Lamb* v. *Walker* (1) as containing a forcible statement of the inconveniences which would follow were we to adopt the opposite view, and I agree that the plaintiff is entitled to succeed in this action.

FRY, L.J.—I am of the same opinion. It seems to me that we are free to decide this case upon principle. The case of *Nicklin* v. *Williams* (3) has been pressed upon us as having received the sanction of the Lord Chancellor in *Backhouse* v. *Bonomi* (2); but it appears to me that it is impossible to carry to its logical conclusion the decision in *Backhouse* v. *Bonomi* (2) and at the same time to treat *Nicklin* v. *Williams* (3) as a binding authority. I think on principle that all damage which arises from one and the same cause of action should be sued for and recovered at one and the same time; and that leads us to enquire what the cause of action is. There are, as Lord Justice Bowen has pointed out, two possible ways in which this question may be answered. It may be that in the class of cases to which this case belongs the subsidence is itself an interference with the property of the person whose land is thereby affected, and therefore that the subsidence is the cause of action; or it may be that the cause of action is that the defendant to the action allows the cavity to continue without any support for the superjacent land, and that damage is thereby caused to the plaintiff. It is not, I think, very material to consider which is the best way of stating the proposition. I incline, like Lord Justice Bowen, to think that subsidence, the result of the defendants' act or omission, is itself an interference with the plaintiff's right to the enjoyment of his property, and is itself the cause of action. If this be so, still the cause of action in the case of the second subsidence is the same as the cause of action in the case of the first, for it is the withdrawal of the stratum without leaving support for the land above it, and it is the act of omission which gives rise to the cause of action. It has also been suggested that an excavation that was not in itself wrongful may become wrongful in consequence of the subsequent subsidence. I do not think that that position can be maintained; but if it could be, still it would follow that the excavation could only be wrongful to the extent of the subsidence which existed at the time of the cause of action, and it is therefore difficult to see how in such a case any damages could be recovered for a subsidence which has not yet occurred. I do not desire to add more, inasmuch as the judgment of Lord Chief Justice Cockburn in *Lamb* v. *Walker* (1) states the principle which seems to me to be the correct principle, and I would adopt that judgment as expressing the true view of the law in this matter.

Appeal allowed (8).

Solicitors—Ridsdale & Son, agents for Saunders, Nicholson & Reeder, Wath, for plaintiff; S. B. Somerville, agent for Baxter & Co., Doncaster, for defendants.

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(8) See next case

[IN THE COURT OF APPEAL.]

1884.
Feb. 12.
July 12.

BRUNSDEN *v.* HUMPHREY.*

Action — Negligence — Damages — Distinct Causes of Action—Injury to Cab—Subsequent Action for Personal Injuries—Effect of Previous Proceedings.

The plaintiff brought an action and recovered damages in the County Court against the defendant in respect of injuries caused to his cab by the negligence of the defendant's servant. The plaintiff subsequently brought an action in the High Court to recover damages for personal injuries arising out of the same act of negligence but which did not develop until after the earlier action had been brought:—Held (*per* BRETT, M.R., *and* BOWEN, L.J.; LORD COLERIDGE, C.J., *dissentiente*), *that the plaintiff was entitled to recover, inasmuch as the cause of action with regard to the cab arose at the time of the accident, whilst the cause of action with regard to the personal injuries to the plaintiff arose when he found that he had been seriously hurt, and consequently the causes of action were not the same but two distinct causes of action.*

Judgment of the Divisional Court (52 Law J. Rep. Q.B. 756) *reversed.*

Appeal by the plaintiff from a decision of the Divisional Court making a rule absolute to enter judgment for the defendant. The case is reported 52 Law J. Rep. Q.B. 758. The facts sufficiently appear in the report of the case in the Court below and also in the judgment of Bowen, L.J.

Waddy, Q.C., and *Crispe*, for the plaintiff.—There were two distinct causes of action here—namely, trespass to the plaintiff's property and trespass to his person; and although damages might now be claimed by a plaintiff in one action in respect of each trespass, there are still two causes of action. No evidence could have been given in the County Court action in respect of the personal injuries sustained by the plaintiff under the particulars filed in the County Court proceedings; the question now raised has never been discussed in those proceedings.

The mere negligence of the defendant's servant would not give a right of action, but it is otherwise where damage to the plaintiff results from the negligence. *Fetter* v. *Beale* (1), *Ashby* v. *White* (2), *Broom's Common Law* (3), *Marzetti* v. *Williams* (4), *Fray* v. *Voules* (5), *Greathead* v. *Bromley* (6), *Earl of Bandon* v. *Becher* (7), *Kitchen* v. *Campbell* (8), *Hambleton* v. *Veere* (9), *Markham* v. *Middleton* (10), *Lee* v. *The Lancashire and Yorkshire Railway Company* (11), *Nicklin* v. *Williams* (12), and *Seddon* v. *Tutop* (13) were cited.

Murphy, Q.C., and *Hannen*, for the defendant.—The test is whether or not the plaintiff could have recovered in the County Court proceedings damages in respect of the personal injuries which he sustained. He might have recovered in the County Court precisely that which he seeks to recover in the present action—namely, damages for the injuries done to his legs; and consequently he cannot maintain this action—*Nelson* v. *Couch* (14). Moreover, the plaintiff knew of the injury to his leg at the time when the County Court proceedings were brought. *Lamb* v. *Walker* (15), *Wright* v. *The London General Omnibus Company* (16), *Moss* v. *The Anglo-Egyptian Navigation Company* (17); Reg. Gen. Hil. Term,

* *Coram* Lord Coleridge, C.J.; Brett, M.R., and Bowen, L.J.

(1) 2 Raym. 339.
(2) 2 Raym. 938; 1 Sm. L. C. 8th ed., 264.
(3) 5th ed., at p. 98.
(4) 1 B. & Ad. 415; 9 Law J. Rep. K.B. (o.s.) 42.
(5) 1 E. & E. 839; 28 Law J. Rep. Q.B. 232.
(6) 7 Term Rep. 455, 456.
(7) 3 Cl. & F. 479.
(8) 3 Wils. 304; 2 W. Black. 827.
(9) 2 Wms. Saund. 6th ed. 169.
(10) 2 Str. 1259.
(11) Law Rep. 6 Chanc. 527.
(12) 10 Exch. Rep. 259; 23 Law J. Rep. Exch. 335.
(13) 6 Term Rep. 607, 609.
(14) 15 Com. B. Rep. N.S. 99; 33 Law J. Rep. C.P. 46.
(15) 47 Law J. Rep. Q.B. 451; Law Rep. 3 Q.B. D. 389.
(16) 46 Law J. Rep. Q.B. 429; Law Rep. 2 Q.B. D. 271.
(17) 35 Law J. Rep. Chanc. 179; Law Rep. 1 Chanc. 108.

1833, rule 5; *Chitty on Pleading* (18), and *Darby and Bosanquet on Limitations* (19) were referred to.

Waddy, *Q.C.*, replied.

Cur. adv. vult.

The following judgments were delivered on February 12:—

BRETT, M.R.—In this case the plaintiff, who was an old man, was driving his own cab, when it was run into by a van belonging to the defendant. The collision was solely caused by the negligence of the defendant's servant who was in charge of the van. The present action was brought to recover damages from the defendant in respect of serious personal injuries sustained by the plaintiff by reason of the servant's negligence. The jury found a verdict for the plaintiff for 350*l.* damages, which shewed that the injury to his person was a serious one. The case was that of an undeveloped injury, and before the present action was brought the plaintiff had recovered a small sum in the County Court in respect of the damage done to his cab. It was urged on the one side that the plaintiff could not succeed in the second action, upon the ground that no person can be sued twice for the same cause of action. On the other side it was contended that the two injuries sustained by the plaintiff were in reality two distinct causes of action, and that there was no rule of law to prevent a person bringing an action in respect of two distinct causes of action. The question here is whether there are two causes of action or one only. No person can recover successive amounts of damages in respect of the same cause of action in different actions; all the damages to which a person is entitled in respect of one cause of action must be recovered in one action. That is an admirable rule when applied to damages which are patent and must have been known to the plaintiff at the time when the first action was brought. But when applied to cases where the damage was not known at the time of the first action but developed afterwards, so that the ulterior damages could not have been known until after the first action had been brought, I have for many years thought it a harsh rule, and one which if it were to be established for the first time would not have my concurrence. The rule is founded upon the maxim that there should be an end to litigation, and it is never vouched except in cases where the subsequent litigation would be a just one. It is an unjust rule as between individuals. Although the subsequent injuries are not and could not be known, we are nevertheless to suppose what is not true—namely, that the jury tried the first case when the subsequent injuries could not be known, and gave damages in respect of those injuries. The question, therefore, remains whether there are two causes of action. The cause of action alleged is an injury by reason of the negligent driving of the defendant's servant. The existence of negligence alone does not give any cause of action: there must be negligence, and also an appreciable damage caused by that negligence. If in the days of strict pleading the plaintiff had declared in respect of injury done to his property, and had relied upon that cause of action, he could not have given any evidence of damage to his person. The cause of action there is injury to property, and every person has a right according to law that his property should not be deteriorated or injured by another. The plaintiff here has recovered damages in respect of that cause of action, and now brings an action in respect of personal injuries. That is a different right. A man is entitled to have his person unmolested and uninjured by the negligence of other persons' servants. The cause of action with regard to the plaintiff's cab arose at the time of the accident, but the cause of action in respect of the personal injuries to the plaintiff arose when he found that he had been seriously hurt. Tests have been applied by Judges at different times to see whether the causes of action are the same or not. One test, which although not a very accurate one is sufficient for the purpose of determining the present case, is whether the same evidence would be necessary to prove both the cases. It is clear that the evidence would not be wholly the same in both cases. We are not, in my opinion, called upon to apply to this case the rule, which

(18) 7th ed., at p. 529.
(19) At p. 8.

for my part I think ought never to be applied except in those cases where it has already been determined that it should be applied. The plaintiff is therefore entitled to recover the sum which was awarded to him. Two different actions may be brought in respect of different causes of action, but not in respect of successive damages arising out of the same cause of action.

BOWEN, L.J.—The plaintiff in this case has recovered a verdict and 350*l.* damages for personal injuries sustained by him through the negligence of the defendant's servant in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box, and seriously injured him in his legs. Previously to bringing the action, the plaintiff had sued the defendant in the County Court for damages done to his cab in the collision, and the particulars delivered under his plaint had been confined to the damages which the cab had sustained. The defendant in the County Court action paid 4*l.* 3*s.* into Court together with 6*s.* costs, upon which the plaintiff had discontinued the County Court plaint. The present action was now brought in the High Court for personal injuries, the importance and extent of which the plaintiff alleged that he had been ignorant of at the time of the County Court proceedings. On a motion for a new trial the Court below have entered a verdict for the defendant, on the ground that the recovery of damages in respect of the cab in the County Court is a bar to any further action for injury to the plaintiff's person. The rule of the ancient common law is, that where one is barred in any action real or personal by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing for ever. "It has been well said" (says Lord Coke in a note to *Ferrer's Case* (20), "'*interest reipublicæ ut sit finis litium*'; otherwise," Lord Coke says, "great oppression might be done under colour and pretence of law"; see also *Sparry's Case* (21), *Higgens's Case* (22), Year Book, 12 Edw. 4. p. 13, 9. Accordingly in *Hudson* v. *Lee* (23) it was held to be a good plea in bar to an appeal of maihem, that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird* v. *Randall* (24) it was decided to be an answer to an action for seducing a man's servant from his service, that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips* v. *Berryman* (25), a recovery in replevin was held to be a good bar to an action on the statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb, "*Nemo debet bis vexari pro eadem causa.*" It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule:—how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit? "The principal consideration," says Chief Justice De Grey, in *Kitchen* v. *Campbell* (8), "is whether it be precisely the same cause of action in both: appearing by proper averments in a plea, or by proper facts stated in a special verdict or a special case; and one great criterion," he adds, "of this identity is that the same evidence will maintain both actions"—see *per* Lord Eldon in *Martin* v. *Kennedy* (26). "The question," says Mr. Justice Grose in *Seddon* v. *Tutop* (13), "is not whether the sum demanded might have been recovered in the former action, the only enquiry is whether the same cause of action has been litigated and considered in the former action." Accordingly, though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence

(20) Co. Rep. pt. 6, 7*a*.
(21) Co. Rep. pt. 5, 61*a*.
(22) Co. Rep. pt. 6, 44*b*.
(23) Co. Rep. pt. 4, 43*a*.
(24) 3 Burr. 1345, 1350.
(25) 3 Dougl. 286.
(26) 2 Bos. & P. 69, 71.

upon some of the claims they might be be recovered in another action—*Thorpe* v. *Cooper* (27). It is evident, therefore, that the application of the rule depends, not upon any technical considerations of the identity of forms of action, but upon matter of substance.

I have now to consider the application of the above doctrine to the case of the present action; and the question to be decided is whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is, in substance, the same cause of action as the damage caused by such negligence to the plaintiff's person. Nobody can doubt that if the plaintiff had recovered any damages for injuries to his person he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence merely because it had been discovered or developed subsequently—see *Fetter* v. *Beale* (1). "The jury," says the Court in that case, "have in the former action considered the nature of the wound and given damages for all the damages that it had done to the plaintiff." This authority, however, leaves still open the point I now have to determine—whether the cause arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question let me assume for the sake of argument that the damage had been caused by some act of the defendant himself, and not merely an act of his servant. According to the old distinctions of forms of actions, which still have an historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been—trespass to the person for the personal injury, trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Every one in this country has an absolute right to security for his person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject-matter of each grievance was the same? Applying the test of identity furnished by Chief Justice De Grey in *Kitchen* v. *Campbell* (8), the first matter that is obvious is that the same evidence would not have supported an action for trespass to the person and an action for the trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justification might conceivably be pleaded as to the assault which would have nothing to do with the damage done to the goods and chattels. In the other case the plaintiff's title to the goods might have been in issue in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And finally, the damage in one case might have been directly due to the wrongful act complained of—in the other case it might not. There is no authority, so far as I know, in the books for the proposition that a recovery in an action for a trespass to the person would be a bar to the maintenance of an action for a trespass to goods committed at the same time. In the present instance, as the defendant himself was not driving but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence based on the negligent management by the servant of his master's horses, a negligence for which, in the eye of the law, the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal or any personal or movable chattel, such as a ship, or machine, or instrument, all are based upon the same principle—namely,

(27) 5 Bing. 116, 129.

that a person who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will, as a rule, involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made either by Judges or juridical writers of the terms *injuria* and *damnum*, it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Baron Parke in *Embrey* v. *Owen* (28), "is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence which are not brought to establish a bare right but to recover compensation for substantial injury. "Generally speaking," says Mr. Justice Littledale in *Williams* v. *Morland* (29), "there must be a temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case"—see *Fay* v. *Prentice* (30) *per* Mr. Justice Maule. This leads me to consider whether in the case of an accident caused by negligent driving, in which both the goods and the person of the plantiff are injured, there is one cause of action only, or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England. According to the popular use of language the defendant's servant has done one act and one only—the driving of the one vehicle negligently against the other. But the rule of law which I am discussing is not framed with reference to loose popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A greater wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse—not the act of driving, which, if no damage had ensued, would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's Act by the widow and children of a person who has been killed in a railway collision is barred by proof that the plaintiff recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter) against splitting demands which are essentially separable—see *Seddon* v. *Tutop* (13)—although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs would have always ample means of preventing any injustice arising out of the reckless use of legal procedure.

In the present case the plaintiff's particulars in the County Court were confined to the damage done to his cab; the injury to his person therefore was neither litigated nor considered in the County Court.

(28) 6 Exch. Rep. 353, 368; 20 Law J. Rep. Exch. 212, 215.

(29) 2 B. & C. 910, 916.

(30) 1 Com. B. Rep. 828, 835; 14 Law J. Rep. C.P. 298.

Brunsden v. *Humphrey, App.*

The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second—see *Seddon* v. *Tutop* (13). With all respect, I do not see how it can be said that *Nelson* v. *Couch* (14) so decides. That case establishes only the converse rule, namely, that the maxim "*Nemo bis vexari debet*" cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of Mr. Justice Coleridge and the other members of the Court in *Hodsoll* v. *Stallebrass* (31) must, I think, be read by the light of the special circumstances of that case, and, so read, is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority in holding, as I do in the present instance, that the damage for which the plaintiff is now suing accrues from a different injury, and therefore a different wrong from that for which he recovered damages in the County Court. The view at which I have arrived is in conformity with the reasoning of the judgment recently pronounced by this Court in the case of *Mitchell* v. *The Darley Main Colliery Company* (32), where it was held, reversing *Lamb* v. *Walker* (15), that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law that none shall be vexed twice for the same cause of action to a case to which it has never yet been applied and to which it can only be applied by pursuing analogy to lengths which would involve practical injustice. The present case is one in which I am conscious that lawyers of great authority do differ and will differ. But, on the whole, in my opinion the judgment of the Court of Queen's Bench ought to be reversed and the judgment entered at the trial for the plaintiff be restored, with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C.J.—In this case I am with much regret unable to concur in the judgment of my brother Bowen, to which I understand the Master of the Rolls to assent. I should have been glad, in the face of this difference of opinion, to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, yet the cause is one and the same. The injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, that is, his person and his goods. It seems to me to be a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if besides his arm and leg being injured his trousers which contain his leg and his coat-sleeve which contains his arm have been torn. The consequences of holding this are so serious and very probably may be so oppressive that I at least must respectfully dissent from a judgment which establishes it. I think the Court below was right, and that this appeal should be dismissed.

Appeal allowed.

Solicitors—Neon & Clarke, for plaintiff; Arkcoll & Cockell, for defendant.

(31) 11 Ad. & E. 301, 305; 9 Law J. Rep. Q.B. 132.

(32) *Ante*, p. 471.

1884. March 21. } SOMERSET (*appellant*) *v.* HART (*respondent*).

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—*Suffering Gaming on Licensed Premises—Knowledge of Servant—Proof of Knowledge on part of Innkeeper—Mens Rea.*

[For the report of the above case, see 53 Law J. Rep. M.C. 77.]

[IN THE COURT OF APPEAL.]

1884. June 30. MELVILLE *v.* STRINGER. (HOUGHTON AND OTHERS, *claimants.*)*

Bill of Sale—Form of—Several Grantees—Consolidation of Debts—Payment on Demand—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 7 *and* 9.

A bill of sale was given to secure payment of several sums of money due to and advanced by five separate parties, and amongst other covenants contained separate covenants with four of the parties to pay on demand the sums due to each, with a declaration that if default should be made in payment of any sum or sums of money thereby secured, or if any other default or event mentioned as a cause of seizure in section 7 *of the Bills of Sale Act* (1878) *Amendment Act*, 1882, *should happen, it should be lawful for the mortgagees to enter, seize, and sell the property*:—Held, *that the bill of sale was a substantial alteration of the form in the schedule to the Act, and therefore in contravention of section* 9, *and void, even assuming it to contain no stipulations inconsistent with the other provisions of the Act.*

Judgment of the Queen's Bench Division (*reported ante, p.* 175) *reversed.*

Appeal of the plaintiff from the judgment of the Queen's Bench Division (reported *ante*, p. 175).

The plaintiff, having obtained a judgment against the defendant, issued execution and seized certain chattels, to which a claim was thereupon made by the holders of a bill of sale dated the 1st of June, 1883.

The bill of sale was expressed to be made between the defendant of the first part, E. Houghton and J. Hallmark of the second part, J. Hallmark and J. Smith of the third part, J. Edwardson of the fourth part, and the said E. Houghton, J. Hallmark, J. Smith, and J. Edwardson (thereinafter called the mortgagees) of the fifth part, and recited that the defendant was indebted to Houghton and Hallmark in the sum of 387*l.* 0*s.* 3*d.* on a joint account, and had given them a bill of exchange payable on the 8th of July then next for 92*l.* 15*s.* 3*d.*, part of the said debt, and that Hallmark and Smith had joined with the defendant in giving to one S. Hughes, to whom the defendant was indebted in the sum of 250*l.*, a promissory note to secure the sum of 250*l.* payable by instalments, and that a sum of 200*l.* was still due on such note, and that the defendant was indebted to Edwardson in the sum of 97*l.* 4*s.* 4*s.*, and that the mortgagees had agreed to lend the defendant a further sum of 150*l.* out of moneys belonging to them on a joint account, and that the defendant had agreed to secure the payment of the said sums of 387*l.* 0*s.* 3*d.* and 97*l.* 4*s.* 4*d.*, and also to secure the repayment of any sums which Hallmark and Smith or either of them might thereafter be called upon to pay in respect of the said promissory note, and also of the said sum of 150*l.* The defendant then assigned to the mortgagees the chattels specifically described in the schedule to the bill, to hold the same by way of security for the payment of the sums thereinafter covenanted to be paid. The defendant covenanted with Houghton and Hallmark to pay them on demand the sum of 294*l.* 4*s.* 10*d.* (being part of the said sum of 387*l.* 0*s.* 3*d.*), and also to pay them the balance on the 8th of July then next, with interest on both sums at the rate of five per cent. per annum. He also covenanted with Hallmark and Smith to pay them on demand such sums of money as they or either of them might be called upon to pay in respect of the promissory note, with interest at the same rate, and also, so long as any principal money thereinbefore covenanted to be paid should remain unpaid after the time appointed for payment thereof, to pay Houghton and Hallmark interest thereon at such rate on the 1st of December and the 1st of June in every year. He also covenanted with Hallmark and Smith that he would pay the two sums of 100*l.* due on the promissory note when the same should become due, and would at all times thereafter keep indemnified Hallmark and Smith from the payment of the said two sums, and from all claims and demands on account thereof, and also with Edwardson to pay him on demand the sum of 97*l.* 4*s.* 4*d.*,

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

with interest at five per cent. per annum, and, so long as any of the said principal sum of 97*l.* 4*s.* 4*d.* remained due, to pay him interest thereon on the 1st of June and the 1st of December in every year. The defendant further covenanted with the mortgagees to pay them on the 1st of July then next the sum of 150*l.*, with interest thereon at the rate of five per cent. per annum, and also, so long as any principal money remained due under the mortgage, to pay to them interest thereon at the same rate by equal half-yearly payments. The bill of sale contained a declaration that if default should be made in payment of any sum or sums of money thereby secured or the interest thereof at the times at which the same were covenanted to be paid, or if any other default or event mentioned as a cause of seizure in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882, should be made or happen, and in any such case, but not otherwise, then it should be lawful for the mortgagees to enter upon the premises and to seize and take possession of the chattels assigned, and at the expiration of five days from such seizure to sell such chattels; and it was further declared that out of the moneys to arise from such sale the mortgagees should pay the expenses attending the sale or otherwise incurred in relation to the security, and in the next place the further advance, and then pay the several parties *pro rata*, and the surplus, if any, to the mortgagor.

The Divisional Court held that the form of the bill of sale did not contravene the provisions of the Bills of Sale Act (1878) Amendment Act, 1882.

The plaintiff appealed.

Ambrose, Q.C., and *Woodard*, for the appellant.—The bill of sale is void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, as required by section 9 of the Act. A bill of sale must be such that the borrower can understand the nature of the security which he is about to give, and that a creditor upon searching the register shall be able to understand the position of the borrower and not be compelled to get counsel's opinion as to the meaning of the security—see *per* Brett, M.R., in *Davis* v. *Burton* (1). This bill of sale is so complicated that it cannot be said to fulfil either of those requisites. Payment on demand is not a stipulated time of payment within the meaning of the form. The money must be paid at a certain time, but when money is payable on demand the time of payment is not certain until the demand is made—*Ex parte Pearce; in re Williams* (2). The effect of the covenants as to interest is that the grantor may have to pay Houghton interest on money paid by Hallmark and Smith, and the grantor is also to pay to each grantee interest on the whole sum due; but the sum so charged with interest was never lent by each grantee, and therefore cannot form part of the consideration, which, according to the form, must be the principal sum lent. The bill of sale also contravenes section 7, for a grantee may seize for default other than the non-payment of the debt due to him, whereas the default must be default in paying the grantee the money secured to him.

French, for the respondents.—The case of *Davis* v. *Burton* (1) was accepted in the Court below. A bill of sale is not inconsistent with the form in the Act because there is more than one borrower or lender. The form must be varied where the circumstances do not fit it. The general scheme is to be complied with subject to the necessary variations for the purpose of carrying out the object of the deed, if that object is consistent with the Act. No provision in the body of the Act has been broken by this deed, and therefore it is in substantial compliance with the form. The real point is whether the mode in which payment was accelerated in the case of some of the mortgagees was necessary for the maintenance of the security. The form does not provide for all the special provisions which may be inserted for such a purpose. If the insertion of such provisions is such as to make the bill of sale intricate, and to that extent not in accordance with the form, the deed will nevertheless be good. The

(1) 52 Law J. Rep. Q.B. ; Law Rep. 11 Q.B. D. 537.

(2) 53 Law J. Rep. Chanc. 500; Law Rep. 25 Ch. D. 656.

proviso as to entry and seizure is necessary for the maintenance of the security, because in the absence of such a provision one of the lenders might obtain a priority over another, and could seize and sell, with the result that the whole security would be wasted. Section 7, sub-section 1, says, "sum or sums of money," thus shewing that the simple form in the Act will not always do, and that the section contemplates complicated transactions. Payment on demand is payment at a certain time, for it is known when the payment will take place—that is, when demand is made.

Godfrey v. *Watson* (3) and *Luke* v. *The South Kensington Hotel Company* (4) were referred to.

BRETT, M.R.—I am prepared to reaffirm the grounds upon which the case of *Davis* v. *Burton* (1) was decided. That case decided that there was a rule of construction which was to be applied to this statute, which rule was expressed by me in these words: "Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold: first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower." That is, in other words, that the Legislature were aiming at this: that for the future a bill of sale should not be allowed to be given in all the forms allowed before, but that it should be given in a form to allow a borrower—not every borrower, but a borrower of ordinary strength of mind—to understand the nature of the security which he was about to give for the debt incurred by him; and, secondly, that it should be of sufficient simplicity to enable the intending lender, upon merely searching the register, to understand the position of the borrower, and not to be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of the security already created by the borrower. That being the rule by which the statute is to be construed, the Legislature has carried it out by certain sections enabling some things and forbidding others to be put into a bill of sale. In addition to these sections you have section 9, which seems to me to have been inserted for the purpose of carrying out that principle which I have enunciated. It says: "A bill of sale made or given by way of security for the payment of money by the grantor thereof"—it is confined to the case of a bill of sale given by way of security for the payment of money by the grantor —"shall be void unless made"—not "in accordance with the stipulations of this Act of Parliament"—nor "unless made in accordance with the bill of sale in the schedule"—but "in accordance with the form in the schedule to this Act annexed." That being the rule of interpretation, and that the section to be interpreted, in *Davis* v. *Burton* (1) I said: "That must mean that every bill of sale must be substantially like the form in the schedule"—that is, not word for word, but substantially like the form — "nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it." I daresay that was all that was necessary for the judgment in that case. But I must say that the rule of interpretation seems to me to go somewhat further, and I desire to express my view that no substantially different stipulation can be added to the form, although not inconsistent with it.

Applying that to the form in the schedule, the form consists of certain things which are set down, but there are in italics certain things of which the form is not given. Therefore I should say that the bill of sale must substantially follow those things which are inserted in the form as part of it, and may also contain those things which are reasonably within the description of the things which are not set down, such as those which are written in large letters, and that it may comprise those things which are reasonably included in those things

(3) 3 Atk. 517.

(4) 48 Law J. Rep. Chanc. 361; Law Rep. 11 Ch. D. 121.

which are in italics. Look at the form thus: It says, "This indenture, made the day of , between A B of the one part and C D of the other part, witnesseth that in consideration of the sum of £ now paid to A B by C D, in receipt whereof. . . . ." That is the form set out. But that is immediately enlarged by these words in italics: "[*or whatever else the consideration may be.*]" Therefore you are not bound by the form to say that it is "in consideration of the sum of £ now paid to A B by C D," because that may not be the real consideration; therefore you may strike out those words and insert whatever else may be the legal consideration. The form continues, "he the said A B doth hereby assign unto C D, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereunto annexed by way of security for the payment of the sum of £ ." Therefore it seems to me that the bill of sale must substantially be by way of security for the payment of a sum of money which is secured, and for the payment of that sum to the person in whose favour the bill of sale is made—"and interest thereon at the rate of . . . . per cent. per annum [*or whatever else may be the rate*]." Of course the interest may be by monthly or weekly payments, &c., and therefore there may be a variation from the form. "And the said A B doth further agree and declare that he will duly pay to the said C D the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated time or times of payment*]." The question has arisen as to what may be the reasonable construction of those words in italics. I will observe on that hereafter, but it must be something which is reasonably within the description of them. "And the said A B doth also agree with the said C D that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*]." It is not necessary to discuss the meaning of that description here further than to say that, in my opinion, there can be no agreement properly made which cannot reasonably come within the description given in italics within those brackets.

The question now arises whether this bill of sale is in accordance with that form. The bill of sale is made between many parties and the proposed borrower for different debts due, not to all of the parties jointly, but to each of them separately. They are different debts of different amounts, borrowed at different times on different terms, and the bill of sale is made with all those parties as separate parties, with terms as to payment to each of the parties upon different considerations. The question is whether such a bill of sale can be said to be in accordance with this form. Can it be said to be such a bill of sale that a borrower could understand the nature of the security which he was about to give for the debt due from him? Can it be said that a creditor, upon merely searching the register, would be able to understand the position of the borrower without going to a solicitor in order to get counsel's opinion as to the meaning of the bill of sale? The counsel for the respondent was obliged to argue that the most intricate bill of sale which the most ingenious solicitor or money-lender could invent, provided it does not break through any of the enactments of the other sections of the Act, must be a bill of sale within the meaning of section 9 and in accordance with the form of the bill of sale in the schedule. I can only say that it seems to me that the effect of that argument is substantially to strike out section 9. If the other sections contained negative enactments which were broken through in a bill of sale, it seems to me that the bill of sale would be illegal without section 9. But that section requires something more than that there should not be stipulations inconsistent with something in the other sections. It requires, over and above that, that the bill of sale should have the simplicity which is enacted in section 9.

It was suggested that, if we decide against this bill of sale on account of the multiplicity of parties and the intricacy of the stipulations, and on account of the uncertainty of the position of the borrower,

which is the inevitable result of joining these different debts due from him to different parties, we should be obliged to hold that, if two partners lent money to two partners on the simple terms that it should be paid on a fixed day, that interest should be paid at a fixed time, and that upon default there should be a right to seize, such a bill of sale would be contrary to the form. I answer "No." Any such bill of sale, where persons really are jointly lending a sum of money to two partners who are jointly liable for the whole, and where therefore one debt is due practically to one debtor, although in name to two, is substantially, though not literally, in accordance with the form. Suppose that two lenders who are not partners had agreed jointly to advance on simple terms one sum either to one debtor who would be solely liable to both, or to two debtors who would be jointly liable to both, I do not think that that would be otherwise than in accordance with the form. It is not necessary to decide that, because here it is sufficient to say that, where the loan is not joint but several, and the terms of it by each of the several lenders are distinct, where the real debt due to each is a separate and distinct debt due to one only and not to the others, that is an attempt to join all those in one bill of sale, and the taking one security is an intricacy and complication of difficulties which shew that such bill of sale is not in accordance with the simple form in the schedule, and therefore is in contravention of section 9.

I admit that it is true to say that that is an interference with the right to make bargains; but this is one of those parental and protective statutes which some people dislike, and it is intended to prevent men doing certain things, however willing they may be to do so—namely, to prevent indigent men from being obliged to comply with the terms upon which men who have money could insist were it not for the protection afforded by this Act of Parliament. It is also meant to protect those to whom those borrowers may subsequently go for further sums. Therefore on that ground, in my opinion, this bill of sale errs against the statute, and is therefore void.

It was said that it erred more specifically in two particulars. First, it was said that the form states that the interest is to be paid by equal payments on particular days, *or whatever else may be the stipulated times or time of payment*, but that this bill of sale may be enforced upon application for payment on demand, and that that is not in the principal part of the form, and cannot be within the reasonable construction of the words in italics. A great authority—namely, Vice-Chancellor Bacon—has given in *Ex parte Pearce* (2) powerful reasons to shew that payment to arise on demand is certainly not within the reasonable construction of the words in italics. To say that a payment on demand which may be made at any time is a payment at a fixed time is contrary to reasonable construction. But it is not necessary in this case to come to a final conclusion whether a stipulation for seizure on default of payment on demand will vitiate the bill of sale according to this form. Those who seek to make such a stipulation efficacious had better be careful, because they must recollect that in the form it is stated that the debt which is due is to be paid "by equal payments of £ , on the day of ," and that it is after those words that you find the description, "or whatever else may be the stipulated times or time of payment." It may be that the true construction is that that is a time which, although not stipulated in terms upon a fixed day, is so stipulated as to produce the same effect. Though I have a strong opinion that the terms as to payment on demand is not within the form, I decline now to give a decision on the point. I found my judgment upon this: the parties to this bill of sale, the terms upon which the moneys were lent, and upon which the payment of each of the sums is to arise, being all distinct, separate, and complicated to the last degree, and wholly devoid of simplicity or of intelligibility without the most careful enquiry, that alone will, in my opinion, cause this bill of sale to contravene section 9, although there may be no stipulation in it in contravention of any other enactment of the statute. I do not say that there are not any such stipulations; but having fixed upon the principle upon which I think the statute must

be construed, and having applied it, I find that this bill of sale breaks through that principle, and for that breach I give my judgment that the bill of sale is void under the Act of Parliament.

BOWEN, L.J.—I have come to the same conclusion. It seems to me that the validity of this bill of sale depends upon whether it complies with section 9 of the Act of 1882 and is in accordance with the form in the schedule. I think that the true test of the validity of a bill of sale under that section, putting aside questions under the other sections of the Act, is whether it conforms to the form in the schedule, with which, as I understand the decision in *Davis* v. *Burton* (1), the conformity must be substantial? I am not sure that I should have said that simplicity is the object of the Legislature, and that that was the test; but, at all events, it is not a rule of construction necessary for the interpretation of section 9, which seems to me to enact that it is conformity with the form in the schedule which is required. That conformity must be substantial, and if an instrument is so complicated that the complication substantially alters the form, that will be a departure from the form. I think that the true interpretation is that nothing must be taken from or added to the form so as to substantially alter it. I do not say that nothing substantial must be added, but nothing which involves substantial alteration of the form. I think that that is what was decided in *Davis* v. *Burton* (1). Does this bill of sale contain substantially what the form does, or does it contain anything which is inconsistent with the form? On examining the form it seems to me that one substantial part of it is that the property must be assigned to the person who finds the money, and to whom repayment is to be made. I do not think that a bill of sale is within the Act if the property is to be assigned to one person and repayment is to be made to another, or if the assignment is to one person to secure repayment to another. It was argued for the respondents that that does not allow the useful commercial practice of making a trustee the person to whom the property is to be assigned, and who is to receive for others repayment of the debt. My answer is that section 9 does not strike at mere legal and substantial variations in general and in result, but at substantial variations in form. The Act says that there must be observance of the form. In this bill of sale the property is assigned to five persons, who are not joint creditors, and to whom there is no joint debt due; the provision is not for repayment to five joint persons as joint creditors to whom the sum is secured, nor for repayment of the sums secured at all, but only of separate portions of the sums secured to each of the five persons in succession. I cannot help thinking that that is not consistent with the form in the schedule, by which the assignee is to be the person to whom the principal sum is to be repaid, and the bill of sale is to be security for the repayment of the principal sum to the assignee. There is no provision in this bill of sale for repayment of a sum of money to the mortgagees as joint creditors, but only of a portion of the sum to each of the mortgagees in succession (I mean as regards the general effect of the bill, for I know that some portion is payable to the whole of the mortgagees). I only wish to add, with regard to the difficulty suggested that a sum payable on demand is not a payment within the meaning of the form, that I feel the force of what was said by Vice-Chancellor Bacon in *Ex parte Pearce* (2). But I abstain from expressing any opinion, and reserve the right to consider that point and the other points which have been raised.

FRY, L.J.—I entirely concur with the conclusions of my brethren, and I do not differ in any way from their views as to the general construction of the statute. The real question as to section 9 is whether the form of the bill of sale in question is substantially the same as the form in the schedule. It seems to me that the form in the schedule expresses the intention of the Legislature in more than one point. It designs, first, that the document should be both brief and simple so far as is consistent with the real bargain between the parties; secondly, that many things shall appear on the face of the document, and shall not require to be ascertained by reference to collateral circumstances or

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which is the inevitable result of joining these different debts due from him to different parties, we should be obliged hold that, if two partners lent mo two partners on the simple term should be paid on a fixed day, should be paid at a fixed upon default there shoul seize, such a bill of sale to the form. I answe bill of sale, where pe lending a sum of who are jointly where therefo cally to one two, is su in accor that tw agree one be

but because I do not entertain any view adverse to the argument for the appellants. The form contains a proviso that the chattels "shall not be liable to seizure or to be taken possession of by the said C D for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882." This bill of sale contains a proviso which is said, and probably truly, to have the same effect as the proviso in the form in the schedule. But it is not identical in point of form, but is partly affirmative and partly negative, and repeats some of the contingencies mentioned in section 7. I am by no means sure that the introduction into a bill of sale of a variation from the form in the schedule, for which variation no reason can be given other than it is to render the document less intelligible, is not a variation in form which will avoid the bill of sale; but I express no opinion on the point.

For the reasons pointed out by the Master of the Rolls in *Davis* v. *Burton* (1) one can gather that the Legislature intended the form in the statute to be substantially followed. If persons will use more difficult forms, which may give rise to questions whether they are the same in form and substance with the forms in the Act, they may make a fatal variation.

For these reasons I concur in the judgment of my brethren, and express a doubt as to the other points, which, if decided according to my present opinion, would be favourable to the grantees of the bill of sale.

Appeal allowed.

Solicitors—Pearce & Sons, agents for James Clement, Manchester, for appellant; Last & Sons, agents for Barrell, Rodway & Co., Liverpool, for respondents.

[IN THE COURT OF APPEAL.]

1884. April 3, 4. THE QUEEN *v.* THE OVERSEERS OF THE PARISH OF TONBRIDGE.*

*Burial—Ecclesiastical District part of a Parish having a Burial Ground and Board—District having separate Burial Ground—Power of to appoint a separate Board—*18 *&* 19 *Vict. c.* 128. *s.* 12.

An ecclesiastical district, not separately maintaining its own poor but having a separate burial ground, which forms part of an old parish separately maintaining its own poor and having a burial board and ground, can, under 18 *&* 19 *Vict. c.* 128. *s.* 12, *appoint a separate burial board for such district, although it forms part of an area for which a burial board already exists.*

Judgment of the Queen's Bench Division reversed.

Appeal from the judgment of the Queen's Bench Division refusing to issue a peremptory *mandamus* to the overseers of Tonbridge to put in force the Burial Acts, 1852, 1853, 1855, and 1857, and to levy and pay a rate to the clerk of the burial board of Southborough. The case is reported 52 Law J. Rep. Q.B. 595.

A *mandamus* having been ordered to issue, a Special Case was by consent stated, from which the facts material to the decision of the Court are summarised.

The parish of Tonbridge is an ancient parish maintaining its own poor; it is made up of the ecclesiastical districts of Tonbridge, Tonbridge Wells, St. Peter's

* *Coram* Brett, M.R.; Baggallay, L.J., and Lindley, L.J.

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hborough, St. Thomas's Southborough, phen's, and Hildenborough, none of as ever separately maintained its

a district was assigned to St. hborough, and a church and a ound were consecrated for the . In 1866 the burial ground was arged, the expense of laying out the and being defrayed by a voluntary rate levied on all the inhabitants of the district. In 1871 a district was taken out of St. Peter and assigned to a new church of St. Thomas: these two districts used the burial ground of St. Peter.

In 1855, after the passing of the Burial Act, 1855 (18 & 19 Vict. c. 128), a meeting of the inhabitants of the parish of Tonbridge was held, at which it was duly resolved that a burial board should be formed for such part of the parish as was not within the district of Tonbridge Wells. This resolution was opposed by the majority of the inhabitants of the Southborough district. A cemetery was established, and the inhabitants of Southborough have always been rated for the expenses of this cemetery, although they continued to use St. Peter's burial ground. In 1879 the burial ground at St. Peter's Southborough was found to be too small; the churchwardens of St. Peter's accordingly summoned a meeting in the nature of a vestry, by notices affixed to all the churches and chapels in the districts of St. Peter and St. Thomas. No notice was given to any parishioners of Tonbridge parish residing outside these two districts. The meeting, consisting of ratepayers from these two districts, appointed a burial board for these two districts. This burial board, having incurred expenses in enlarging the burial ground attached to St. Peter's, issued a certificate, under 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 18 & 19 Vict. c. 128, to the overseers of the parish of Tonbridge, certifying that the sum of 292*l.* 10*s.* was required for the payment of expenses, and requiring them to levy and collect that sum and to pay it to the clerk of the Southborough burial board; that sum was apportioned according to the rateable value of the property within the district of St. Thomas and the rest of the district of Southborough.

The overseers declined to act on the certificate, on the ground that the burial board of Southborough could not be legally constituted. The Southborough burial board contended that they were legally constituted, and the question for the Court was whether the inhabitants of Southborough had any power to constitute a separate burial board for the districts of St. Peter and St. Thomas.

The Queen's Bench Division gave judgment for the defendants, the overseers of Tonbridge, and refused a peremptory *mandamus*, holding that the inhabitants of Southborough had no such power.

The Southborough burial board appealed.

Sir H. Giffard, Q.C. (with him *F. M. White, Q.C.*, and *Archibald*), for the appellants.—The smaller part of the old parish, which has now become an ecclesiastical district, can appoint a separate burial board. The facts of this case bring it within 18 & 19 Vict. c. 128. s. 12 (1), so

(1) 18 & 19 Vict. c. 128. s. 11: "Where a parish or place has been united with any other parish or place, parishes or places, for all or any ecclesiastical purposes, or where two or more parishes or places have heretofore had a church or burial ground for their joint use, or where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such parishes or places, it shall be lawful for the vestry, or any meeting in the nature of a vestry, of such several parishes or places in any of the cases aforesaid, and whether any one or more of such parishes or places do or do not separately maintain its own poor, to appoint a burial board, and from time to time to supply vacancies therein, and to exercise the same powers of authorisation, approval, and sanction in relation to such burial board and such other powers as under the said Acts and this Act are vested in the vestry of a parish or place separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground for the common use of such several parishes or places and for facilitating interments and otherwise, as if such several parishes or places had been a parish separately maintaining its own poor; and the expenses of the burial board appointed under this provision shall be borne by the several parishes or places for which such board is appointed, and shall be apportioned among them by such burial board in proportion to the value of the property in such several parishes or places as rated to the relief of the poor; and the sums required by the burial board in respect of the portion of such expenses to be borne by

that it is not necessary to contend that it falls within 20 & 21 Vict. c. 81. s. 5. The overseers can levy a rate for the expenses, and confine it to that part of the old parish comprised within the ecclesiastical district affected by it—18 & 19 Vict. c. 128. s. 13. The judgment of the Queen's Bench Division limits overmuch the power of districts to separate from one another in the matter of burial boards. If section 12 applies to this case, then there arises no question of separation after union of two districts, because there is no union, there is only an agreement for a joint burial board; and at any time, according to section 12, a district not separately maintaining its own poor may appoint a burial board for itself.

The Queen v. *Walcot* (2nd case) (2) was decided on the meaning of the word "parish," and does not affect this case, save as to the question of separating one ecclesiastical unity into different portions.

Charles, Q.C., L. Smith, Q.C., and *Candy*, for the respondents.—The Legislature did not intend that there should be two burial boards exercising jurisdiction over the same area; and if there are two, inconvenience and hardship must arise. In all the legislation on this subject, the unit is the parish, otherwise there might be in this case three burial boards within the one parish of Tonbridge, and then the ratepayers of the last formed district, having a burial board, might have to pay three burial board rates, for the whole rateable area is liable to contribute to the expenses of maintaining and, if necessary, enlarging the burial ground of the mother parish. The power being once given must remain, unless it is expressly taken away, so that as to part of the parish which has been divided into districts the burial boards will have concurrent jurisdiction, and that is contrary to the general scheme of legislation on this subject; and as there is in the case of a divided parish, such as this parish, no longer one undivided entity, section 12 (1) of 18 & 19 Vict. c. 128 does not apply to it.

Even if the words of section 12 (1) appear to apply to such a case as this, still the whole intention of the Legislature, as declared in 18 & 19 Vict. c. 128, shews that this case does not fall within section 12 (1), and this view is supported by the provisions contained in 20 & 21 Vict. c. 81. The legislation found in the various statutes relating to this subject shews that the intention was to have one rating authority over the whole area contained in the old parish.

Viner v. *The Overseers of Tonbridge* (3) was cited.

BRETT, M.R.—I become more and more convinced that the safest rule to follow in construing an Act of Parliament is to give to the words used their ordinary meaning in the English language, having regard to the subject-matter of the enactment. No doubt questions of difficulty and inconvenience will arise on many statutes, and if considerations and arguments of alleged injustice are allowed to have weight doubt will arise as to the proper construction to be adopted. Unless there is something in the enactment which prevents the Court from giving to the language of the statute its ordinary interpretation and construction, it seems to me that that is the construction to be given to it.

The question in this case arises upon 18 & 19 Vict. c. 128. s. 12, which enacts:—"The vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply

any such parish or place shall be paid out of the rates for the relief of the poor in such parish or place, in like manner as if such burial board had been appointed for such parish or place alone."

Section 12: "The vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground and otherwise, as if such parish, township, or other district had been a parish separately maintaining its own poor."

(2) 2 B. & S. 555; 31 Law J. Rep. M.C. 217.

(3) 28 Law J. Rep. M.C. 251.

vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor, and the burial board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish, township, or other district had been a parish separately maintaining its own poor." Now it is clear that in that section a district is distinguished from a parish or a township; it is admitted that the words of that section, taken in their ordinary grammatical sense and idiom, apply to the district with which this Case is concerned; but it is said nevertheless that we ought not to apply this section in its terms to this case, and it is said that there are two lines of considerations which oblige us to read the words of this section in some other than their ordinary meaning. It is urged that if we give their ordinary grammatical construction to the words of this section the section will be found to be in contradiction to other sections contained in a series of Acts relating to burial boards, all of which have to be construed together. If indeed this were so, and if we could not construe this section in the way in which we are construing it without contradicting those other Acts, then I agree that the canon of construction would apply that all the Acts which have to be read together must be so read as not to contradict one another. But it has not been shewn that if we read this enactment in the ordinary sense of the words contained in it we shall contradict those other Acts; but it has been urged that inconvenience must result if we read these words according to their ordinary meaning; and further it has been said that great injustice will result. I am of opinion that this argument of inconvenience is a dangerous doctrine; if indeed an inconvenience would be caused which no reasonable man would ever think of suggesting from any business point of view, or if absurd inconvenience were to be caused, then I think there would be a reason which would lead us to construe the words of the Act not according to their strict grammatical sense and ordinary meaning when applied to the subject-matter of the enactment. If the enactment were such that by so reading it palpable injustice would be caused, then we should be bound to assume that the Legislature intended the words to be read in a sense which they are capable of bearing, though it is not their ordinary meaning, and so as not to cause injustice.

Is there then any absurd inconvenience which must result from reading this section in that which seems to me to be the proper way of reading it? It is said that the consequence will be that there may be two burial boards in the same area, that the board of the minor district may deal with the smaller part of the area, and that the board of the larger part of the district may also deal with the smaller part of the area. Let that be so, the only inconvenience which can follow is that certain people in the whole district may have to contribute to both boards; that is not an inconvenience in managing or working the boards, it is in fact an inconvenience which is only the same thing as the suggested injustice, for the injustice which has been pressed on us is that some persons may be obliged to bear a double burden. But the people of the larger part of the district, that is of the original parish, would not suffer from that, so that they would have no cause of complaint; but then it is said that they would suffer, because the people in the smaller district who might have to pay double rates might thereby become of less ability to pay their contribution to the larger district. I think that that is too infinitesimal, and that it cannot be considered. The alleged injustice must be considered with reference to the smaller district, the district formed out of the original district: if this district does by forming its own burial board get rid of all liability to the larger district, then there is no double burden and no injustice. But however that may be, I think we must for this case assume that the smaller district does retain its liability to the larger district after it has formed its own burial ground, and that its inhabitants are liable to pay their share of the burden caused by the burial board of the larger and older district. I decide this case on that assumption, and assume that they

may have to pay a double rate; but where is the injustice? It is their own choice, they elect by their own vote to do so, and there are cases in which it might be unjust to prevent them from doing so. If there be a large parish containing at one end a district which is populous and wealthy, is it to be said that because a burial board has been once appointed for the whole of the parish, therefore the district which has become rich and populous, which is ready to pay, which desires to have a second burial board and burial ground, shall not be permitted to have it? It appears to me that on a balance of injustice that would be more unjust than the injustice suggested by the respondents, and that the suggested injustice really cuts away part of their contention. Seeing, then, no injustice which will be occasioned by our reading this section in the ordinary grammatical sense of the words as applied to the subject-matter of the enactment, I think that that golden rule of construction ought to be applied in this case to this district, and therefore that this burial board is a legally constituted burial board. I do not think the cases cited are an authority opposed to this decision. There are some expressions of Mr. Justice Blackburn in the case of *The Queen* v. *Walcot* (2nd case) (2) which seem to favour the view that the existence of two burial boards in one area would be an absurdity, and Mr. Justice Crompton seems to have doubted whether there might not be some injustice in allowing such a state of things; but I do not think those expressions ought to prevent us from allowing this appeal and from ordering a peremptory *mandamus* to issue.

BAGGALLAY, L.J.—As the other members of the Court are of opinion that this appeal should be allowed, my dissent from the judgment of the Court would not have any effect; nor do I desire to dissent, although I have had doubts during the argument, and I am unable to say that they have been entirely removed. The main object of the Legislature in passing the 15 & 16 Vict. c. 85 was to put an end to burial in the metropolis, and the interpretation clause defines "parish" to be "every place having separate overseers of the poor and separately maintaining its own poor," and overseers to be "any persons authorised and required to make and collect or cause to be collected the rate for the relief of the poor of the parish." Afterwards the Act 16 & 17 Vict. c. 134 was passed, in section 7 of which occur the provisions extending the enactments of the earlier Act to parishes not in the metropolis, but still limited to parishes; so that at the time when 18 & 19 Vict. c. 128 was passed the existing statutory provisions dealt with parishes as a whole; the preamble of this Act shews that it was intended to alter the law, and in this Act occurs section 12, upon which this case turns. Southborough is, as I understand, a district having a burial ground and not separately maintaining its own poor; it had this burial ground for some twenty years before any of these statutes were passed, and I think it cannot be doubted that if this section 12 stood alone it would entitle the burial board of Southborough to call on the overseers of Tonbridge to pay the expenses of maintaining it, and perhaps of enlarging it.

I assent to the rule of construction which the Master of the Rolls has laid down, but I think that when one Act has to be read together with other Acts on the same subject-matter it is possible to obtain assistance in construing it from the other Acts to which reference has to be made. It has been urged that when a burial board has been appointed for the whole of a district there is no provision for the appointment of a burial board for a portion of the entire district. That has raised a doubt in my mind, which has, however, been to some extent removed by section 5 of 20 & 21 Vict. c. 81, in which I find the power given to deal with portions of a district for the appointment of a burial board, and this seems to indicate the general view of the Legislature that there was a power of dealing with portions of a district even if a board were appointed for the whole. That section therefore does to some extent remove the doubts which I should have entertained if section 12 of 18 & 19 Vict. c. 128 had stood alone; but although my doubts have not been wholly removed I do not desire to dissent from the judgment of the Court.

The Queen v. *Overseers of Tonbridge, App.*

LINDLEY, L.J.—In this case we find an ecclesiastical district carved out of the old parish of Tonbridge, and that district, which is that of St. Peter's Southborough, has a burial ground. In 1871 another district was taken out of Southborough, and that is the district of St. Thomas. Tonbridge Wells is also a district which was some time ago carved out of the old parish of Tonbridge, and Tonbridge Wells has a burial ground of its own.

The Act which was passed before 1855 applied to parishes, the Act of 1855 (18 & 19 Vict. c. 128) was passed to amend the law, and we find in section 12 of that Act that provision is made for districts which are not parishes. Now it seems to me that if we consider section 12 alone this case falls within the terms of that section. But the difficulty suggested is that section 12 only mentions one board, so that if a board already exists then no other board can be appointed. I do not think that this can be the meaning of the legislation on this matter. I see no reason for drawing a distinction between the old mother parish of Tonbridge having its own burial board, and a district or parish, as it may be called, such as Tonbridge *minus* Tonbridge Wells. Reference has been made to 23 & 24 Vict. c. 64. s. 4, which enacts, "Where any parish or place has been divided into two or more parts or districts, for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, for such entire parish or place to appoint a burial board without the approval of one of her Majesty's principal Secretaries of State."

That is a difficult section, but it seems to me to shew that no second burial board could be appointed without the permission of the authority named there, and that it could be done with that permission: so that it is possible that there can be a burial board for a district and also one for the whole parish.

It is then said that 20 & 21 Vict. c. 81 and the case of *The Queen* v. *Walcot* (2) are opposed to this view. It is no doubt true that inconvenience may follow from the construction which we are putting upon 18 & 19 Vict. c. 128. s. 12, but possibly 20 & 21 Vict. c. 81. s. 5, may obviate some of those inconveniences.

It is difficult to say what the position of Southborough will be if it gets its separate burial board: it may be liable to a double rate and a double burden; but if the inhabitants impose that on themselves it cannot be said to be unjust.

I think therefore that the Master of the Rolls has put the true construction on these statutes, and that the judgment of the Queen's Bench Division must be reversed.

Appeal allowed.

Solicitors—Tilleard, Godden, Holme & Co., for prosecutors; Thomas White & Sons, agents for Alleyne & Walker, Tonbridge, for defendants.

1884. March 13. THE GLOUCESTERSHIRE BANKING COMPANY *v.* PHILLIPS. CREAGH, *third party.*

Practice — Third Party — Judgment against — Refusing to state Defence — Order XVI. rule 52—*Judicature Act*, 1875, *section* 24.

Judgment may be ordered, under Order XVI. rule 52, *against a third party who has appeared after a third-party notice has been served on him, if the third party, on the hearing of an application for directions, declines to state any defence, and if the Judge is not satisfied that there is any question proper to be tried.*

Such judgment may be ordered against a married woman as a feme sole declaring her separate estate liable, although the liability was incurred prior to the passing of the Married Women's Property Act, 1882.

Order XVI. rule 52 *does not deprive the third party of any rights to which such party would have been entitled if sued by the defendant in the ordinary way, and is therefore not ultra vires.*

Appeal from order of Field, J., at chambers, that a judgment be entered in favour of the defendants against the third

party in an action against the defendants as executors for a sum due on a guarantee given by the testator in respect of the banking account of the third party, and declaring that any separate estate of the third party not subject to any restraint against anticipations to which she at the date of the guarantee was and to which she is still entitled was chargeable with the payment to the defendants of the sum of 291*l.* 10*s.* and interest at four per cent. from the date of the order until payment, and that an enquiry be had before the Master as to her separate estate, and execution be limited to the same.

The defendants appeared to the writ, and then obtained leave to serve a third-party notice on Mrs. Creagh, and paid the sum sued for into Court, and the plaintiffs formally accepted it in full satisfaction. The third party appeared, and the defendants took out a summons for directions or for judgment against the third party, under Order XVI. rule 52 (1), before the Master, who, however, made no order. On appeal to Field, J., at chambers, he ordered as above, after the third party had declined to state what question of liability there was to be tried or to make an affidavit of merits.

Bray, for the third party, in support of the appeal.—Order XVI. rule 49 (1) was complied with. An appearance was entered. We desired to dispute the plaintiff's claim. The defendant has no right by paying the money to deprive us of our right to defend. It is not necessary for any defendant, except under Order XIV., to swear to having a defence, and that order does not apply to a third party. Under the Judicature Act, the third party, after service of the third-party notice, is entitled to "the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by the defendant." If power to order summary judgment against a third party appearing, but not having an opportunity of defending the action, is given by Order XVI. rule 52 (1), it is *ultra vires* as depriving her of her right to defend. The Judge has only to be satisfied that there is a question of liability—that is, liability under a contract of indemnity or contribution.

The liability here, if any, was incurred before the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75. s. 1), and that Act is not retrospective.

Finlay, Q.C. (with him *J. W. Chitty*).—Rule 52 (1) is not *ultra vires*. The Judicature Act, 1873, section 24, gives power to make rules calculated to avoid multiplication of proceedings. And this is only a matter of procedure.

The Married Women's Property Act, 1882, is retrospective as regards matters of procedure—*James* v. *Barraud* (2). The Judge must be "satisfied that there is a question proper to be tried as to the liability of the third party." The words are clear; and here he was not so satisfied.

Bray, in reply.

LORD COLERIDGE, C.J.—This is an application to reverse an order made under

(1) Order XVI. rule 49: "If a person not a party to the action, who is served as mentioned in rule 48 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice. Provided always that a person so served, and failing to appear within the said period of eight days, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit."

Rule 52: "If a third party appears pursuant to the third-party notice, the defendant giving the notice may apply to the Court or a Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

(2) 3 W.R. 786.

Order XVI. rule 52 (1), and the question is whether, if a third party will take no proceedings at all when brought before a Judge on an application for directions, the Judge may, under that order, if he is satisfied that there is no question proper to be tried, "order such judgment as the nature of the case may require against the third party." I cannot see how the learned Judge could have done otherwise in this case. He asked the parties when they were before him whether the third party had any defence to the defendant's claim. The third party would not say whether there was any defence or not, but stood on her rights, and contended that the Judge could not proceed under rule 52. Her counsel said he had no instructions, and she refused to make an affidavit. In those circumstances Mr. Justice Field was bound to say that he was not satisfied that there was any question proper to be tried, and to give judgment therefore against the third party. What has been done here is, I think, exactly in the terms of Order XVI. rule 52 (1), and were we to reverse it we should be deciding that that rule does not give the Judge the power which in fact it in terms does give. Then it was argued that, the third party in this case being a married woman, judgment could not be ordered against her; but the case of *James* v. *Barraud* (2) is a clear decision that the Married Women's Property Act, 1882, is retrospective as to procedure. That Act provides that on and after the commencement of that Act a married woman shall be capable of suing and being sued in all respects as if she were a *feme sole*. The third party in this case being a woman with separate estate, the case of *James* v. *Barraud* (2) and general principles are, in my judgment, against this contention of the third party. It was further contended, however, that this rule is *ultra vires*, because under the Judicature Act, 1873, the third party is to be entitled to the same rights as if she were a defendant, and this rule deprives her of a right which a defendant would have. But there is no right taken away which a defendant would have. If any other defendant would not make any defence when properly called on to make it, judgment may be signed against him under the rules. The third party has been called on for a defence, but has given none. She is not therefore deprived of any right which any other defendant has. But furthermore, the Judicature Act, 1875, section 24, has, if it were necessary, which I doubt, enlarged the power of the Rule Committee of the Judges. That section provides for "modifying" provisions in respect of the practice or procedure of any Courts the jurisdiction of which is transferred to the High Court of Justice or Court of Appeal "to any extent that may be deemed necessary for adapting the same to the High Court of Justice or the Court of Appeal." There is therefore no ground for suggesting that this rule is *ultra vires*. This rule applies only to procedure, and matters of procedure are clearly within the jurisdiction of those who made the rule. There is no fear of injustice being done by rules so made, because, as is well known, they lie on the table of both Houses of Parliament for forty days during the session of Parliament, and if either House were dissatisfied with them there is power to address the Crown for their disallowance, and they would probably be disallowed. Without the later Act, therefore, there was power to make this rule, and clearly there is such power with it. The order of the Judge follows the rules, and this appeal must therefore be dismissed with costs.

WILLIAMS, J.—I have come to the same conclusion, but not on the same grounds. If it had been quite clear that Order XVI. rule 52 really deprived the third party of her right to defend, I should have come to the conclusion that such a rule was *ultra vires*, because power is only given by the Judicature Act to the Rule Committee to make rules to regulate procedure. But I do not think that is a true view of the rule. I think the rules as to the third-party procedure have substituted a different machinery to that which would be used in an action brought against a defendant. By them a defendant is entitled to serve on a third party a notice in form App. B. No. 1. There is no statement of claim delivered, but the notice given practically is the statement of claim. If the third party

intends to dispute either the plaintiff's claim against the defendant, or that of the defendant against him the third party, he must appear. After he has appeared, if he does not dispute the plaintiff's claim, but does dispute the defendant's claim, what is the procedure? It is not an action in which a time is limited for putting in a statement of defence. Order XVI. rule 52, the provisions of which are distinct, gives the defendant an opportunity of bringing a third party before the Judge to satisfy the Judge that there is something to be tried. This I think does not take away any rights with respect to her defence that the third party would have had if she had been a defendant sued in the ordinary way. If when brought before the Judge the third party, as in this case, declines to satisfy the Judge that there is something to be tried, the third party is I think in the same position as a defendant in default in delivery of his defence.

Appeal dismissed.

Solicitors—A. Parper, for plaintiff; E. Bromley, agent for Notcutt & Son, Ipswich, for defendant; Field, Roscoe & Co., agents for H. Maule, Newnham, for third party.

BANKRUPTCY. 1884. June 18. } *Ex parte* WEMYSS; *in re* WEMYSS.

Bankruptcy — Jurisdiction to rescind Receiving Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.

There is jurisdiction to rescind a receiving order under section 104 *of the Bankruptcy Act*, 1883, *whereby "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."*

Appeal by the debtor from the decision of the County Court Judge at Birkenhead declining to allow the petition to be withdrawn and the receiving order rescinded.

The debtor filed a bankruptcy petition on the 5th of May, 1884, and a receiving order was made. He was indebted to unsecured creditors in the sum of 710*l.* 5*s.* 4*d.*, and to the executors of D. H. Collins in the sum of 800*l.* secured by mortgage, and he owed his father 1,844*l.* partly secured. Two days after the filing of the petition the debtor's father paid all the other unsecured creditors in full, and thereupon the debtor applied to the Court for an order rescinding the receiving order and allowing the petition to be withdrawn. The executors of Collins and the debtor's father assented, and the official receiver expressed himself satisfied; but the Judge was of opinion that he had no jurisdiction under the Act to allow the petition to be withdrawn or the receiving order rescinded, but made an order that all further proceedings should be stayed.

J. E. Linklater.—By section 104 of the Bankruptcy Act, 1883, it is provided that "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." Under section 35, "where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full," the Court may annul the adjudication. The adjudication need not be made only to be annulled.

The official receiver was served with notice of appeal but did not appear.

The Court (Mathew, J., Cave, J., and Day, J.), were clearly of opinion that there was jurisdiction to discharge the receiving order. The Act presented no difficulty.

Solicitors—Pritchard, Englefield & Co., agents for Bleakley & Co., Birkenhead, for appellant.

[IN THE HOUSE OF LORDS.]

1884. March 27, 28. THE MERSEY STEEL AND IRON COMPANY (LIMITED) *v.* NAYLOR, BENZON AND COMPANY.

Contract—Monthly Delivery of Goods—Nonpayment for one Delivery—Repudiation of Contract by Seller—Winding up—Right to set off Unliquidated Damages—Judicature Act, 1875, *s.* 10.

By a contract made between the plaintiffs, a limited company, and the defendants, the defendants agreed to purchase a quantity of steel, which the company were to deliver by monthly instalments commencing in January, 1881. *The company delivered part of the first instalment in January*, 1881, *but before the time for payment a petition was presented for winding up the company. On the 9th of February, after the time for payment had expired, the defendants being advised that they could not, pending the hearing of the petition, pay the company, wrote to suggest that an order of the Court might be obtained authorising the contract to be carried out and payments made for deliveries under it. On the 10th of February the company replied that they should consider the refusal to pay as a breach of contract releasing them from any further obligations. The defendants replied on the 12th, repeating their suggestion, and urging that the delay in payment was no justification for treating the contract as at an end. On the 15th an order was made to wind up the company. On the 17th, the defendants' solicitor wrote to the liquidator claiming damages for the failure to deliver the January instalment, but offering to pay for deliveries without deduction, on the liquidator's consenting, with the authority of the Court, to keep the payments to a separate account, and that they should be made without prejudice to the defendants' claim to deduct the damages. He added that he thought it probable the defendants would consent to accept delivery then and waive the damages. The liquidator made no further deliveries and brought an action for the price of the steel delivered:*—Held, *first, that the payment for one instalment was not a condition precedent to the delivery of the rest; secondly, that the conduct of the defendants had not been such as to release the company from the contract, as they had not shewn any intention to renounce or refuse absolutely to perform it on their side, and the delay in payment was not a breach going to the root of the contract.* Held *also, that section* 10 *of the Judicature Act*, 1875, *made the rule in bankruptcy as to mutual credits and set-off applicable to winding-up, and that the defendants were entitled to set off against the payments due from them for deliveries damages for the company's breach of contract.*

This was an appeal from a judgment of the Court of Appeal which reversed one of Lord Coleridge, C.J.

The facts are fully stated in the reports of the case in the Courts below, 51 Law J. Rep. Q.B. 576; Law Rep. 9 Q.B. D. 648, and appear sufficiently for the present report in the headnote.

Cohen, Q.C., and *French* (*C. Russell, Q.C.*, with them), for the appellants.—Contracts of this kind are based on punctual payment, to put the manufacturer in funds and enable him to continue manufacturing for future deliveries. Payment for one parcel is a condition precedent to the right to call for delivery of the next. This is implied in the rules laid down in the notes to *Pordage* v. *Cole* (1). A solvent purchaser ought to pay; an insolvent purchaser ought not to have delivery—*Turnbull* v. *McLean* (2). In *Withers* v. *Reynolds* (3) this question was left open.

The Court of Appeal held that in order to release the vendor there must be an intention evinced by the purchaser not to perform the rest of the contract. It is contended that the refusal to perform a material part is enough—*Hoare* v. *Rennie* (4) and *Honck* v. *Muller* (5). Otherwise the purchaser is seeking to enforce upon the vendor a contract different from that originally made. The law gives no

(1) 1 Wms. Saund. (Ed. 1871) 548.
(2) 1 Sess. Cas. (4th ser.) 730.
(3) 2 B. & Ad. 882; 1 Law J. Rep. K.B. 30.
(4) 5 Hurl. & N. 19; 29 Law J. Rep. Exch. 73.
(5) 50 Law J. Rep. Q.B. 529; Law Rep. 7 Q.B. D. 92.

damages for breach of a contract to pay money (even interest can only be obtained when stipulated for or under statute), therefore it ought not readily to enforce a contract to deliver without payment. Here the purchasers at first refused to pay because they supposed erroneously that they could not get a discharge, afterwards they refused because they claimed to deduct for unliquidated damages. By so doing they have committed a breach of the contract and the appellants are entitled to rescind—*Graves* v. *Legg* (6), *Coddington* v. *Paleologo* (7), and *Bradford* v. *Williams* (8). Even in equity time is of the essence of a mercantile contract—*Reuter* v. *Sala* (9). *Freeth* v. *Burr* (10) is distinguishable, and the decision there is probably wrong in law.

The other question in the case is whether there can be a mutual set-off of unliquidated damages in the winding-up of a company. There could not before the Judicature Acts. What then is the effect of section 10 of the Judicature Act, 1875? Does it make section 39 of the Bankruptcy Act, 1869, applicable to a winding-up? There is no express decision on the point, but the current of authority and *dicta* in *In re Withernsea Brickworks* (11), *In re The Albion Steel and Wire Company* (12), and *Thomas* v. *The Patent Lionite Company* (13) (which cases decided respectively that sections 87, 32, and 34 of the Bankruptcy Act were not made applicable) are in favour of a narrow interpretation of the clause.

The Solicitor-General (*Sir F. Herschell, Q.C.*), (*Bigham, Q.C.*, with him) was directed to confine himself to the question of set-off.

(6) 11 Exch. Rep. 642; 23 Law J. Rep. Exch. 228.

(7) 36 Law J. Rep. Exch. 73; Law Rep. 2 Exch. 193.

(8) 41 Law J. Rep. Exch. 164; Law Rep. 7 Exch. 259.

(9) 48 Law J. Rep. C.P. 492; Law Rep. 4 C.P. D. 239.

(10) 43 Law J. Rep. C.P. 91; Law Rep. 9 C.P. 208.

(11) 50 Law J. Rep. Chanc. 185; Law Rep. 16 Ch. D. 337.

(12) 47 Law J. Rep. Chanc. 229; Law Rep. 7 Ch. D. 547.

(13) 50 Law J. Rep. Chanc. 544; Law Rep. 17 Ch. D. 250.

This is a question as to "debts and liabilities provable." Unless section 10 of the Judicature Act, 1875, confers the right of set-off, different debts would be provable in liquidation from what can be proved in bankruptcy—*In re Compagnie Générale de Bellegarde* (14).

THE LORD CHANCELLOR (EARL OF SELBORNE).—In this case I will deal first with the last point which has been argued, and it appears to me that it lies within a very narrow compass. The Act of 1875 has said that for certain purposes "the same rules shall prevail and be observed" in winding up under the Companies Acts "as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt," and I cannot help pausing to observe upon what is a little remarkable in that enactment. It is not the rules that *were* in force when the Act of 1875 was passed, but the rules which "*may be* in force for the time being"; marking very strongly the principle on which the Legislature in this enactment proceeded—namely, that they treated the cases as *in pari materia*, governed, as the former clearly are, by the same principles which govern the law of insolvency or bankruptcy; that it was safe, not only to apply the then existing rules upon that subject, but to apply them with any future addition or alteration which in legislation as to bankruptcy might be thought fit. That I think very distinctly confirms the weight which otherwise might be given to the consideration of the principle and reason of the enactment. But I do not think that any aid from that consideration is really necessary, because we find that among the rules which are to be imported from bankruptcy there are included the rules "as to debts and liabilities provable." Is not the rule in question a rule as to debts and liabilities provable? It occurs in that division of the Bankruptcy Act, 1869, which is under the sub-heading as part of the Act, "Payment of debts and distribution of assets." The 1st section under that head is one which, following a long series of earlier statutes, makes

(14) Law Rep. 4 Ch. D. 470.

demands in the nature of unliquidated damages arising by reason of contract provable in bankruptcy, and similar demands which do not so arise and which are not of that nature, not provable. The Act defines what are to be proved—all debts and liabilities and obligations, except certain things which are excepted; there are two or three clauses dealing with special matters, and we then come to the 39th, which occurs under the same division of the statute: "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively." Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that that is not a rule both within the general spirit and intention of the section and within the express words "as to debts and liabilities provable"? I do not think it necessary to say more upon that subject.

Upon the other point I do not think it desirable to lay down larger rules than the case may require or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (10), which is, in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to shew why I cannot adopt Mr. Cohen's argument as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case; but to me it is plain beyond the possibility of controversy that upon the proper construction of this contract it is not, and cannot be, a condition precedent. The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery: "Delivery, 1,000 tons monthly, commencing January next"; and as to the time of payment: "Payment, net cash within three days after receipt of shipping documents"; but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel.

But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so

conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to release himself from a future performance of the contract. The question is, whether the facts here justify that conclusion? Now, the facts which are relied upon, without reading all the evidence, are these. The company, at the time when the money was about to become payable for the steel actually delivered, fell into difficulties, and a petition was presented against them. There was a section in the Companies Act, 1862 (section 153), which appeared to the advisers of the purchasers to admit of the construction that, until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive and could give a good discharge for the payment of the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did evidently *bona fide*, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain that discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which, according to the advice they received, they supposed to exist—namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person, no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who, if there had been no petition, would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person, and therefore an alienation. I cannot ascribe to their conduct the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed by means which were suggested to them and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th of February, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (they being so far correct and thinking rightly) that the objection was not well founded in law; and they added, "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part, and as releasing us from any further obligations on our part." I think that they were clearly wrong in that conclusion, and that clearly there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement under those circumstances.

The company until they were wound up never receded from that position which they took up on the 10th of February, 1881; and it appears to me to be clear that the liquidator adopted it and never departed from it; and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th of February, 1881, after the making of the winding-up order, they state that there are instalments which

ought to have been delivered, but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and according to the view which has been taken in the Court of Appeal of the effect of the 10th section of the Act of 1875, and in which view I believe your Lordships agree as being correct, that was the right way of looking at it. Then the respondents go on to say that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, perfectly defensible, and perfectly justifiable proposal. And the solicitor who writes the letter adds, "or I think it probable that my clients would consent to accept delivery now and waive the damages"—a thing which in a later letter they express their willingness to do. In my judgment they have not in any portion of the proceeding acted so as to shew an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN.—I am of the same opinion. On the effect of the 10th section of the Act of 1875, I will only say that I perfectly agree with what the Court below have said and with what has been said by the Lord Chancellor.

As to the first point, I myself have no doubt that *Withers* v. *Reynolds* (3) correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in *Withers* v. *Reynolds* (3) it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract," but he might sue for damages. That was settled in *Hochster* v. *De la Tour* (15) in the Queen's Bench, and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived.

That is the law as laid down in *Withers* v. *Reynolds* (3). That is, I will not say the only ground of defence, but a sufficient ground of defence. In *Freeth* v. *Burr* (10) it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not wait at this time of the day to go through them, but when the facts are looked at it is to me clear that it is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it—and for a very good reason, that the market price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bona fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers* v. *Reynolds* (3) and *Freeth* v. *Burr* (10), and consequently, as I understand it, Lord

(15) 2 E. & B. 678; 22 Law J. Rep. Q.B. 455.

Coleridge went wrong, made a mistake, in fact, in the ground on which he went. I think that the rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (1)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." That is a good defence, and so *Pordage* v. *Cole* (1) lays it down. But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any case of authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of *Hoare* v. *Rennie* (4) it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver a part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in *Honck* v. *Muller* (5), which has been referred to, it is expressly and pointedly shewn that that was the ground taken; and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to take 2,000 tons of iron, provided the other party gave him the whole and no smaller quantity, and that inasmuch as it was to be by three instalments, and the first was gone and there never could be more than two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the other party required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract—whether it was or not I do not express any opinion, except to point out that, whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract; and that being so, these cases have really no bearing upon the matter.

One ground upon which Lord Coleridge decided the case was upon a mistake of fact. The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

Lord Watson.—I am quite of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure from any terms in the contract by one of the parties is to

be sufficient to entitle the other to set it aside. I think the correspondence shews that the delay in making payment of that part of the contract price which ought to have been made on the 5th of February was due to these two causes: in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make a second payment of the price, and in the second place an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2nd of February, and the respondents' firm were advised by their law agent that they were not in safety in paying until the liquidator was appointed.

That brings us down to the 15th of February. At that date this had taken place, the company had given notice on the 10th of February to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator I think consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

LORD BRAMWELL.—I am of the same opinion, and shall say but very few words. My Lord Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but if they had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers* v. *Reynolds* (3), and the reasoning which you have heard. But I really cannot, with great submission to the noble Lord, find any evidence of it at all, and Mr. Cohen certainly did not attempt to prove it: but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree.

I have just one other word to say, which is this. I cannot tell why *Honck* v. *Muller* (5) and *Hoare* v. *Rennie* (4) should be brought forward upon this occasion. I do not think that I said in *Honck* v. *Muller* (5) what Sir G. Jessel (16) supposed me to have said—namely, that in no case where the contract has been part performed could one party rely on the refusal of the other to go on. If I did say so I recant, I recall it, because I do not think so. What I was busy upon in that case was in shewing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the man accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck* v. *Muller* (5) was wrongly decided, how does it bear upon this case? Not the least at all. Nor indeed does the case of *Hoare* v. *Rennie* (4), which, in my opinion, was decided upon the considerations which I have mentioned and which I think should be supported.

LORD FITZGERALD.—I concur.

Orders appealed from affirmed, and appeal dismissed, with costs.

Solicitors—W. W. Wynne & Son, agents for Simpson & North, Liverpool, for appellants; G. M. Clements, for respondents.

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(16) 51 Law J. Rep. Q.B. 682; Law Rep 9 Q.B. D. 658.

[IN THE COURT OF APPEAL.]

1884. June 24. } GRIFFITHS *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY.*

Master and Servant—Pleading—Defect causing Injury to Servant—Knowledge of Master—Ignorance of Servant—Negligence.

In an action by a servant against his master for injuries sustained by him in the course of his employment by reason of the defective condition of the machinery which the servant has to use, or of the premises upon which he has to work, or of the means by which the service is to be fulfilled, the statement of claim must allege, not only that the master knew, but also that the servant was ignorant of the danger which was the cause of the injuries sustained.

Appeal from a decision of the Queen's Bench Division allowing an objection in law to the plaintiff's statement of claim.

The claim alleged that the plaintiff, at the time of the action, was in the employment of the defendant company; that on the 25th of February, 1882, the plaintiff was lawfully in or near one of the warehouses of the Royal Albert Dock, the property of and in the use and occupation of the defendant company, when one of the iron doors, being part of the permanent construction of the defendants' premises, without any warning, gave way and fell with great force and violence upon the plaintiff; that the defendant company, at the time of and previous to the plaintiff receiving the injury complained of, knew, or ought to have known, of the defective, unsafe, and insecure condition of the iron door, and it was altogether owing to the negligence of the defendant company that the same was not put into a safe and secure condition. The plaintiff claimed damages for the injuries which he had sustained.

The defendants objected that the statement of claim was bad in law, upon the grounds, *inter alia*, that it did not shew any contract between the defendants and the plaintiff that the door should have been in any condition other than the condition alleged, nor that the plaintiff was ignorant of its condition, nor any duty by the defendants towards the plaintiff in relation to the same.

The Queen's Bench Division (Day, J., and Smith, J.) gave judgment for the defendants, being of opinion that the statement of claim must allege, not only that the master knew, but also that the servant was ignorant of the danger which was the cause of the injury to the servant.

The plaintiff appealed.

Fillan, for the plaintiff.—It is not necessary that the statement of claim should allege that the plaintiff was ignorant of the defect in the door. That is an allegation which the defendants should allege by way of defence. *Watling* v. *Oastler* (1) and *Williams* v. *Clough* (2) were cited.

Gorell Barnes, for the defendants, was not called upon.

BRETT, M.R.—This is not a question of contributory negligence, but whether *prima facie* a cause of action is shewn by the plaintiff where the alleged cause of action is one by a servant against his master for an alleged wrongful condition of the machinery which the servant has to use, or of the premises upon which he has to work, or of the means by which the service is to be fulfilled. A statement of claim which alleges the existence of danger in any of those cases which I have mentioned, owing to the negligence of the master, shews no cause of action. Except in one peculiar condition, no duty is imposed upon the master to see that the machinery, premises, or materials with regard to which the services are to be rendered are in a safe condition. That has been the law ever since the decision in *Priestley* v. *Fowler* (3). The only case in which there is a cause of action is where the danger or defect is known to the master but not to the servant. The knowledge of the master and want of knowledge of the servant together make a

* *Coram* Brett, M.R.; Bowen, L.J., nd Fry, L.J.

(1) 40 Law J. Rep. Exch. 43; Law Rep. 6 Exch. 73.

(2) 3 Hurl. & N. 258; 27 Law J. Rep. Exch. 325.

(3) 3 Mee. & W. 1; 7 Law J. Rep. Exch. 43

cause of action against the master, the general rule being that these two things must be both averred and proved. The Judges in the Court below were therefore right in holding that these two things must appear in the statement of claim. It was said that the view taken by Baron Martin in *Watling* v. *Oastler* (1) was in conflict with the judgment of the Court below in this case. But that is not so, because although those two propositions did not appear in express terms upon the pleadings they could be implied from the allegations in the declaration. The case of *Williams* v. *Clough* (2) is also against the contention on behalf of the plaintiff, because the Court there held that it was not only necessary that there should be an averment of a defect in the machinery which was known to the master, but also that the declaration must contain an averment that the danger was not known to the servant. It was suggested by Baron Bramwell that something more than that ought to be averred by the plaintiff—namely, that he had no means of knowing that the machinery was not in a safe condition; but the Court differed from him as to that, and held that it was sufficient for that question to be raised in the plea. For these reasons I think the decision of the Court below was right on the ground on which it was put, and the appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. The old forms of declaration contained the averment that the danger which caused the accident was known to the master but not to the servant. Both these allegations are material; without them there would be no cause of action. The servant undertook to run the risk as part of the terms of his service; he could not therefore shew that the master was in default. The allegation that the danger was unknown to the servant is vital to the cause of action; if it was not directly proved at the trial, or if it could not be inferred from the facts, the plaintiff ought to be nonsuited. It was argued for the plaintiff that this objection ought to be raised in the defence; but that is not true, and the old forms of pleading are against that contention. It was said that the case of *Watling* v. *Oastler* (1) decided that a declaration was good although it did not contain this special averment; but Chief Baron Kelly and Baron Martin only decided that case upon the ground that although the ignorance of the servant was not in terms averred, yet it could be implied from some other averments in the declaration. The statement of claim here does not contain any such allegation. I agree with what has been said by the Master of the Rolls as to the case of *Williams* v. *Clough* (2).

FRY, L.J.—I am of the same opinion. It is plain that it is necessary to aver in the statement of claim the knowledge of the master and the ignorance of the servant in order to shew a cause of action.

Appeal dismissed.

Solicitors—Bordman & Co., for plaintiff; W. M. Hacon, for defendants.

[IN THE HOUSE OF LORDS.]

1884. April 1, 3, 4. } THE JUSTICES OF MIDDLESEX *v.* THE QUEEN.

Prison Act, 1877 (40 & 41 *Vict. c.* 21), *s.* 36 — *Superannuation Allowance or Gratuity—Compensation for Removal from Office—Retirement to facilitate Improvements in Organisation — Apportionment of Compensation between Rates and Money provided by Parliament—Superannuation Act*, 1859 (22 & 23 *Vict. c.* 26), *s.* 7.

The Treasury have power under the second and last clauses of section 36 *of the Prison Act*, 1877, *coupled with section* 7 *of the Superannuation Act*, 1859, *to apportion between the rates and moneys provided for the purpose by Parliament an annuity payable to an officer who, being under sixty years of age and not incapable from confirmed sickness, age, or infirmity or injury received in actual execution of his duty of executing his office in person, has retired*

from office to facilitate improvements in the organisation of the department to which he belonged.

This was an appeal from a decision of the Court of Appeal affirming one of the Queen's Bench Division.

The case is reported in the Courts below, 52 Law J. Rep. Q.B. 552; Law Rep. 11 Q.B. D. 656.

After the passing of the Prison Act, 1877, Colonel Colvill, the governor of Coldbath Fields Prison, retired in order to facilitate improvements in the general administration of prisons. The Treasury awarded him an annuity of 582*l.* 13*s.* 4*d.* by way of compensation, and apportioned the amount by fixing 429*l.* 6*s.* 8*d.* to be paid out of the rates and 153*l.* 6*s.* 8*d.* to be paid by the Government.

The Justices refused to pay the 429*l.* 6*s.* 8*d.* on the ground that the annuity was not granted by way of superannuation allowance or gratuity, and that there was no power to apportion it under section 36 of the Prison Act, 1877, so as to make the ratepayers liable.

A *mandamus* was applied for to compel payment by the Justices. The facts were by consent stated in a Special Case.

The Courts below decided in favour of the application. The Justices appealed.

R. S. Wright (*Hannen* with him), for the appellants.

The Solicitor-General (*Sir F. Herschell*), and *Danckwerts* (*The Attorney-General* (*Sir H. James*) with them), for the Crown.

THE LORD CHANCELLOR (EARL OF SELBORNE).—Perhaps it may be convenient that your Lordships' attention should first be directed to the last point which has been raised under the 7th section of the Act of 1859, because if that point were tenable it would be entirely fatal both to the grant of this pension to the officer now immediately concerned, and, as far as I can judge, to all the grants which have been made to any officers of the same class—a most serious consequence. If your Lordships were obliged to arrive at that result, nobody can tell how far-reaching it might be in its operation and effect as to other cases also; and it would be certainly most unwillingly that your Lordships could adopt that view, not only bearing in mind those consequences, but also bearing this in mind—that though the point does not seem to have been lost sight of either when the Special Case was settled or when the argument took place before the Court of Appeal, yet it was one which the Justices are obviously and for reasons creditable to themselves most unwilling to press, which they rather endeavoured to use as putting a kind of compulsion upon the Court to yield to their views upon a totally different point, and which, therefore, was rather a subsidiary portion of their argument than the main fundamental ground of it; and yet it is evident that if the objection be tenable it is a fundamental objection.

Now, after consideration and hearing what has been said on both sides, your Lordships, I think, are agreed that you may safely hold what is said here about the necessity of a special minute to be directory and not in the nature of a condition precedent on which the validity of the grant must essentially depend; and, I may add, I think directory for reasons which apply, not to anything which has been actually granted in the present case, or in any case exactly like it, but which would apply to any excess beyond that which in the present case has been granted.

I cannot but refer upon this subject to what appears in the documents which are part of the Special Case as to the practice of the Treasury. This particular grant was announced not alone, but with other grants under the Prison Act of 1877, by a Treasury letter, addressed to the Secretary of State on the 2nd of August, 1878, in which the Under-Secretary or the proper officer of the Treasury writes, "I am directed by the Lords Commissioners of Her Majesty's Treasury to acquaint you, for the information of the Secretary of State, that my Lords have been pleased to award to the prison officers mentioned overleaf the pensions set against their respective names, apportioned between the rates out of which their salaries were payable immediately before the 1st of April, 1878, and moneys voted by Parliament; and I am to state that my Lords have directed the Pay-

master-General to pay the portions of the pensions payable out of voted moneys from the dates specified in each case.' And some correspondence having followed with the county officers, there is a subsequent letter on the 9th of January, 1879, from the Treasury to the Secretary of State, in which this is said: "The letter announcing the pension is the only evidence of the action of the board in granting it which has ever been given, or, as my Lords believe, has ever been asked for since pensions began to be granted. The Comptroller and Auditor-General — an authority not open to the charge of being too easily satisfied—accepts these Treasury letters as sufficient vouchers for all pensions payable out of public moneys. It is not immaterial to notice that when pensions of a special character are to be granted, the Legislature has provided that copies of the minutes granting such pensions shall be laid before Parliament. Such an express provision, coupled with uniform practice from the time of this statute (22 Vict. c. 26), not to mention the earlier statute of 1834 which it partly embodies, sufficiently proves that the intention of the Legislature was to leave the Treasury to settle the routine of procedure in other cases. The Prison Act of 1877 contains no directions to the Treasury as to the process of awarding pensions beyond such as may be gathered from the word 'award' in section 36, read in connection with the Superannuation Act of 1859, to which my Lords are referred for certain purposes in that same section. My Lords consider that it would be a very serious thing for a public department to depart from its procedure in the transaction of its business after so long a sanction by usage, nor can they consent to do so. In addressing their awards to the Home Office and not to the late prison authorities, my Lords have believed themselves to be complying with the view of the Secretary of State"—and so on.

Well that, I think, seems to shew that the view upon which the Treasury have acted and all officers have acted, upon which pensions have been actually paid and the payments passed through the audit office, has been this: that, except when an exceptional reason has required information to be given to Parliament, the ordinary procedure should be in all respects adopted, and that this ordinary procedure amounts to a grant and an award of a pension; and I cannot but think that when we bear that in mind, as we properly may in connection with the language of the clause, we can see our way to distinguish between that which operates as a grant to the pensioner, and that which ought to be done by the granting authority for the purpose of giving information to Parliament in certain cases. The clause begins with the words, "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office," and so forth, "such special annual allowance by way of compensation" as they consider proper—I need not follow the terms of the clause at this moment.

Now we must consider the question as between the Treasury and the grantee. It would be a most serious thing if he should suffer for any neglect of those things which are to be done in any particular case by the Commissioners of the Treasury, of which he has no knowledge, for which he has no responsibility, and over which he can have no control. The correspondence which I have read shews distinctly that, as a general rule, the uniform practice of all the Government departments is to consider the grants or the awards of pensions as made in the manner in which they have been made in this particular case; and I cannot but ask the question, in those cases in which the Treasury ought to make a special minute for the purpose of being laid before Parliament—assuming, as I suppose we must assume, that the words "special minute" have some technical meaning, and that such letters as those which I have read do not come within it—I would ask, I say, the question, How is it possible that the title of an officer to his pension can be held to depend upon a thing resting with the Commissioners of the Treasury alone, upon minutes to be made by them in their own proper minute-books in their own department, to which the Acts of Parliament do not give the pensioner, as far as I can see, any right of access, and

which they do not even require to be communicated to the pensioner, because they only require that they shall be laid before Parliament?

With those preliminary considerations we have to approach the words which relate to this special minute—"If the compensation shall exceed"—a certain amount (and for the present purpose I need not enter into the detail of that)—"such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament." It seems to me that the object of that is to account for the excess, and to account for it by reasons to be communicated to Parliament, and that in the nature of the case it is not intended to affect the validity of the grant, at all events so far as relates to that which is not in excess, and which if granted alone would not require any special minute at all. But I do not shrink from going farther than that, and from saying that if that which is granted might properly be granted, and if the grant or the award is made, as far as the officer is concerned, in the usual manner, and communicated to him in the usual manner, I do not think that the neglect of the Treasury or of their proper officer to record in their proper books a special minute, or their neglect to lay that special minute before Parliament, need be construed as nullifying what otherwise would be a valid grant and award of a pension, made and announced to the pensioner in a form which is sufficient in all other cases. Therefore I think that your Lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument in a manner which certainly would avoid consequences in the last degree inconvenient and, I may add, unjust, which otherwise might possibly result.

That argument being out of the way, it appears to me that the rest of the case may be disposed of without much difficulty. I will first refer to the arguments raised upon the clauses of the Act of 1877. Now the 36th clause of the Act of 1877, in its first paragraph, speaks of a case of superannuation after a certain length of service, or after a certain age has been attained; but it also applies that very term "superannuation allowance" to other cases which do not come within the natural and proper idea of the mere word "superannuation"—namely, cases of incapacity from sickness, age, or infirmity, or injury received in the actual execution of duty; all of which are contingencies independent of mere age, independent of mere length of service, and therefore to which the term "superannuation allowance" can only be applied in a secondary, and not strictly etymological, sense. That of itself seems to me to go a considerable way towards destroying the foundation of the main argument advanced at your Lordships' bar, which was this: that the term "superannuation," or "superannuation allowance," is used throughout this and other Acts in a technical sense inapplicable to the case in which an officer is retired and put upon a pension for the reason that his office is abolished or that his retirement will facilitate improvements in the organisation of the department. I confess I can see no reason in the nature of things or in the original meaning of the term why what is granted upon compulsory retirement, or upon a retirement with the consent of the officer because it is desirable to abolish his office or to reorganise his department, should not be called a superannuation allowance, as much as in a case in which he retires, not because he has attained a certain age or has served for a certain number of years, but because he has suffered accidental injury in the service, or has fallen into sickness or other infirmity.

Then the next section of the 36th clause is this, and this is the section which, I think, is applicable to the present case: "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who, by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act, 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office or for the purpose of facilitating improvements in the organisation of the department to which he belongs." That, in effect, means that such a case as that with

which we are now dealing should be dealt with under the 7th section of the Superannuation Act, 1859. The third paragraph of clause 36 in the Act of 1877 deals with "Prison Service," which is there defined, and we then come to the particular words upon which so much argument was offered to your Lordships: "Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act, and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act, out of rates which, at or immediately before the commencement of this Act, were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament." Now it was insisted, as I understood the argument, that because that portion of the clause begins with the words "Any annuity by way of superannuation allowance or gratuity granted under this section," the apportionment provided for would only be applicable to a case in which the retirement is after a certain length of service, or a certain age, or from incapacity by reason of sickness, age, infirmity, or injury received in the execution of the office, as to which it is indeed true that in the first paragraph of the section there are the words "An annuity by way of superannuation allowance or a gratuity," the same words which we have in this fourth paragraph. The argument was that those words occurring in both those places mean the same thing in both, and that therefore they mean in the second place neither more nor less than they mean in the first, and are inapplicable to any of the cases mentioned in the second paragraph of the section, and therefore to the case now before your Lordships' House. Now I cannot but think that that argument sticks to the letter, and loses sight entirely of the spirit and substance, of the clause. I am not sure whether I should have been able to say so if there had been nothing in the context of the paragraph itself to make the matter clear, because, undoubtedly, there would then have been force in the observation that the words "Any annuity by way of superannuation allowance or gratuity" are the very same words which occur in the first paragraph of the section, and do not occur in the section elsewhere.

I confess that that is the only argument which would have had much weight with me, even if the context had not made, as it does to my mind make, the matter perfectly clear: because, although it may be very true that, on account of the natural and original meaning of the word "superannuation," there may be particular clauses in some of the Acts upon this subject which give a more limited meaning to that word than others, on the other hand there are some clauses which appear to me to justify and even to require a larger meaning; and I cannot but say that the mere fact that the Act of Parliament which is expressly here referred to as the Act by which the grant of a pension, in such a case as that now before your Lordships, is to be regulated is called "The Superannuation Act of 1859," and is referred to here by title, goes a very long way to repel the narrow and technical interpretation which the argument of the appellants seeks to put upon that word "superannuation." The Legislature thought that all the cases of pensions provided for by the Act came within the sense of the word "superannuation," as conveniently and popularly used, sufficiently to make that short title a good general description of all that was done by the Act.

But I need not dwell upon that point, because it seems to me that, upon the very face of this clause, the Legislature has manifested, in the most unequivocal manner possible, an intention to include in these words "Any annuity by way of superannuation allowance or gratuity" the particular case provided for by the second paragraph with which your Lordships have

now to deal. The words "without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department" are applicable to that case and inapplicable to any other, and the fact that that is not to be taken into account shews plainly that but for that exclusion it might have been taken into account in the view of the Legislature; and therefore those are cases within the purview and intent of this particular paragraph. That argument of the appellants, therefore, appears to me entirely to fail.

I now come to the remaining arguments. The argument upon the 53rd section was this, that this particular officer would not have been entitled to such an allowance as that which has been awarded to him under the Prisons Act, 1865. The section is, "Nothing in this Act contained shall entitle any existing officer of a prison to any superannuation or other allowance the conditions of whose office would not have entitled him to superannuation or other allowance under the Prisons Act, 1865." But the conditions of such an office as this would have entitled this officer to a superannuation or allowance under the Prisons Act, 1865—that is to say, would have entitled him in the only sense in which anybody could have been entitled, it would have been in the power of the proper authorities to give it to him. And the section does not say that he shall not be entitled to any other or greater superannuation allowance than he could have obtained under the Prisons Act, 1865; but that unless he is an officer holding such an office as would have brought him within the superannuation provisions of the Act of 1865 he shall not be brought within those provisions of the Act. But Colonel Colvill was an officer who would have been within those provisions, and being such an officer he gets the full benefit of the provisions of this Act. That argument, therefore, entirely fails.

Then we come to the argument upon the Act of 1859. Now I do not think it advisable without necessity to enter into a question upon which possibly some of your Lordships may not take the same view as I do. I have certainly formed a pretty clear and decided opinion as to what is the meaning of the hypothesis in the 7th section of the Act of 1859 upon which the necessity for a special warrant depends, and I certainly do think that it contemplates this case, that there is an amount ascertained which it is proposed to award by way of compensation to the officer under that section which would exceed the amount to which he would be entitled calculated upon the principles of the 2nd section with ten years added to his actual period of service, and it does not appear to me, I confess, at present (though I do not think it at all necessary for your Lordships to decide the question) that that can be expanded into anything more than ten years by anything which is done or by any right or title derived by the officer under the 4th section. But that point your Lordships, in my opinion, need not determine, because it is admitted here as a matter of fact that nothing has been apportioned against the Justices of the annuity granted to Colonel Colvill, excepting the amount to which he would be entitled in respect of length of service computed upon the principles of the 2nd section of the Act of 1859, and the addition made, if properly made, under the 4th section of the same Act; and the question is, whether those are matters which, according to the true interpretation of the Act of 1877, can properly be chargeable upon the county by way of apportionment. No question arises as to the amount computed upon the actual length of service under the 2nd section—it is admitted, upon the assumption of there being a valid grant of pension at all, that it was apportionable, as it has been apportioned, against the county. But the question arises under the 4th section. Now the 4th section of the Act of 1859 provided this, that by a general order or warrant the Treasury might direct that when any person now holding an office coming within any certain classes should retire from the public service, a number of years, not exceeding twenty, to be specified in the order or warrant, should, in computing the amount of superannuation allowance under the 2nd section, be added to the number of years during which he might have actually served. It is manifest that in the cases to which that

provision applies, the additional number of years is not added in respect of abolition of office, or to aid in the re-organisation of the department, but it is added in respect of a totally different class of considerations —namely, the character of the office, and the requirement of peculiar qualifications in the person holding that office.

Well, that being so, the next question is, whether Colonel Colvill's case comes within that provision at all or not. In the year 1860, the year which immediately followed the passing of that Act, a general order or warrant was duly made by the Commissioners of the Treasury specifying certain classes of officers who were to have the benefit of this 4th section to the extent there mentioned. The governors of prisons are put in, as I understand, so as to entitle them on retirement to have five years added to their period of service, on account of special qualifications, within the meaning of that 4th section, being required of them. It is said, and truly said, that in 1860 Colonel Colvill was not a governor of any public prison, and was not a public servant or a public civil servant in the sense of these Acts or of that order. But when in 1877 he was brought within that category, and when under the Act of 1877 the Superannuation Act of 1859 was made applicable to the case of pension upon the retirement of such an officer, I apprehend that the Act of 1859 was made applicable in all its provisions; and as he had then become and was a public servant in the civil service of the Crown within one of those categories which had been mentioned in the order or warrant of 1860, it appears to me quite impossible to say that the 2nd section of the Act of 1859 is to be applied to this case and not the 4th. That being so, the addition of five years is properly made to his actual period of service, and that is in respect of the peculiar character of his office and the qualifications required for it. That being so, when we come back to the 36th section of the Act of 1877, it seems quite impossible to treat those five years as to be excluded under the words "without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department," because those five years were not added to the officer's service on account of abolition of office or for facilitating the organisation of the department, but were added for a totally different purpose, and nothing has been added which can come within that category. Nothing has been apportioned against the county except that portion of this gentleman's pension which represents his actual period of service, and that additional portion which represents the allowance of so many years in addition to the years of actual service, not added on account of the abolition of his office or for facilitating the organisation of the department, but because he was the governor of a prison in a particular category. I really cannot agree with the argument of Mr. Wright that there is the smallest difficulty in apportioning over the number of years' service the total amount of compensation though five years are added to the actual service. It is as easy to apportion a hypothetical addition of five years as it is to apportion the actual period of service. The thing to be apportioned is "any annuity by way of superannuation allowance or gratuity granted under this section." The annuity granted under this section, excluding that which it is proper to exclude, is the annuity which represents the actual period of service and the five years added. The manner of apportionment is free from difficulty, because it is to be between the period of service before the commencement of this Act, an ascertained period, and the period of service after the commencement of this Act, an ascertained period. The numerical ratio is ascertained by a comparison of the two periods. The thing to be apportioned is the annuity actually granted by way of superannuation allowance, excluding, as in this case has been excluded, any number of years added for abolition of office or for facilitating the organisation of the department.

Therefore, the principal argument failing—namely, that there has been no valid grant of an allowance—the result is that the order appealed from is right and ought to be affirmed, and I move your Lordships accordingly.

LORD BLACKBURN.—I am of the same opinion. I think it is most convenient to

begin by referring to the Superannuation Act of 1859, and considering the question as if the Justices of Middlesex had nothing to do with this case, as if it was Colonel Colvill who was setting up a claim, which had somehow come before us, to have a pension calculated upon the number of years that have been allowed to him, and that he was seeking that pension under the Superannuation Act of 1859. I will consider that first.

Now, supposing that to be so, section 7 is the one under which he would claim. "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring, or removed from the public service," upon grounds which apply to Colonel Colvill's case, "such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said Commissioners to be a reasonable and just compensation for the loss of office." Now, stopping there, it is plain enough that the Lords of the Treasury are to be the sole judges, or the persons who are to judge what they think is reasonable and just compensation for the loss of office, and that they are to grant that by way of an annual allowance. But what follows immediately afterwards gives an indication of how the Legislature supposed they would consider it. "If the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act," is the idea which then comes in. From that it is plain enough that the Legislature thought that the annuity which would be granted would be considered thus, if instead of the man being turned out of his office he had retired as being superannuated, he would have had an annuity of such and such a proportion to his salary. In Colonel Colvill's case it would have been an annuity proportioned to twenty-three years of service, he having come within the class which is mentioned in section 4 as being a peculiar class to be dealt with in a peculiar manner.

On that ground Colonel Colvill would have been entitled to that, unless what follows is made a condition precedent to the granting by the Commissioners of the retiring allowance to him. It says that if it exceeds what it would be if ten years were added to the number of years he had actually served, "such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament." I do not enquire into the question whether or no the particular case is brought within that class for which a special minute is required—whether ten years under this section being added, and five years being added under section 4, brings it within the term requiring a special minute—I do not enquire into that. I will assume for the purposes of the argument that it does require a special minute (though I am not prepared exactly to express an opinion either one way or the other upon the question), and that the Lords of the Treasury neglected their duty in not making a special minute stating the special grounds and laying that minute before Parliament. I think that is not intended to be a condition precedent to the grant in favour of the officer of his retiring allowance, but as what is commonly called directory only. It is an enactment put in (if I may use plain English about it) in case there should be "jobs"; the Lords of the Treasury when they do this unusual thing shall state in a minute their special reasons for it, and shall lay that minute before Parliament, and have them criticised.

There are many cases—I was not aware that this point was to be raised, and I have not looked into them, and I cannot refer to them—but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to a grant, or whatever it may be, but a condition subsequent—a condition as to which the responsible persons may be blameable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done—third persons having nothing to do with that.

Therefore, if this case had arisen under the Superannuation Act of 1859, and that Act alone, I think that Colonel Colvill would have been entitled to a superannuation allowance, which he has received, calculated upon a number of years, including both the years of his service and

also the ten years which have been added on acount of the abolition of his office.

Now let us see what the Legislature said in another Act of Parliament. Inasmuch as this was a prison office which had been transferred to the Government, and from which Colonel Colvill retired after he had become a civil servant of the Government under the Prisons Act, we are referred to section 36 of the Act 40 & 41 Vict. That section provides, first, that if any officer retires on account of ill-health, or for various other reasons which do not apply to the present case, a superannuation allowance may be granted.

Then, secondly, it says that, "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison, who, by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act, 1869, with respect to a person retiring, or removed from the public service in consequence of the abolition of his office," and so on. That brings us to this, that Colonel Colvill having now retired, his case is to be dealt with according to the Act of 1859, section 7, to which I have already alluded, and that says that he is to have such annual allowance as the Lords of the Treasury, considering all the circumstances, think it just to appoint to him.

Then comes the provision on which the present question arises: "Any annuity by way of superannuation allowance or gratuity granted under this section" (that is, section 36), which includes, I should have thought, if there had been nothing else to the contrary, not only a superannuation allowance properly so called, but an allowance granted under the clause which has preceded it beginning with the words, "If any office in any prison is abolished"—I should have thought that it would have come under that if it had stood alone; but that would have been a matter of some doubt and difficulty. It "shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity and allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid"—in the present case the amount of salary was not altered, but owing to Colonel Colvill having become a civil servant the amount of his superannuation allowance on which he would retire was altered; but that I think does not affect the present case—"but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority." That is really where the question comes in.

It was argued that in the previous Acts (and owing to the very clumsy mode in which the Act is drawn, by referring to a whole number of previous Acts, I suppose we ought to look at them all) "superannuation allowance" has acquired a technical meaning, or rather that it was not said it had acquired a technical meaning, but that it had often been used in one sense whereas "allowance by way of compensation" had been used in another, and therefore that we ought to construe the earlier part of the section as confined to those which were strictly superannuation allowances. That argument would hardly, I think, have prevailed with me (although I see Lord Justice Lindley, if I understand him rightly, says in his judgment that it would have prevailed with him) if this subsequent part of the section had not come in; but when I find these words added, "but without taking into account any number of years addded to the officer's service on account of abolition of office," it becomes quite clear to my mind that the Legislature meant to include in it, not only the superannuation allowance which was mentioned in the first part of the paragraph, but also the allowance which by the wording of the second paragraph in section 36 is ordered to be given, dealing with him in the same way as he would have been dealt with under the Act of 1859, if he had been a civil servant under the Act of 1859; and in that case he is to have such annual allowance as the Lords of the Treasury have thought to be reasonable and just compensation; but if such annual allowance ex-

ceeds the amount which he would have been entitled to as superannuation, then, says the Act, that portion of the amount which is measured by the additional years granted on account of abolition of office shall be struck off, and the Justices, or the people who pay the rates, shall not be called upon to pay that, but it shall be paid out of moneys voted by Parliament. Why should not that be just and proper? I cannot see. It seems to me very reasonable and proper. If once you say the retirement is to be compensation for having served for a time under the ratepayers, and then after a time having served under the Crown, and now being turned out, it seems to me most reasonable that the amount of compensation which is given should, as far as regards the service before, fall upon the ratepayers, and that the amount as far as regards the service since should fall upon the Crown who have enjoyed it since; and so far as regards that portion which is added in consequence of the abolition of the office, subsequently to his becoming a servant of the Crown, that should fall on the Crown. That seems to me perfectly reasonable and just—and that is, I think, what the Legislature has said.

There is one other point that was made. It was said that under section 4 of the Superannuation Act the amount which he was to have when he was retiring under superannuation was to depend on the number of years' service; and if he was in a particular class within which the governors of prisons (the office which Colonel Colvill held) were brought, he was not only to have that amount of superannuation which was allowed him for the years of service, but also five years more, just as if he had served five years more. Such is the enactment there. That is an addition to his superannuation allowance, if it had come to be a superannuation allowance, by adding years, but it is not an addition by adding years owing to the abolition of the office. It is the amount of the superannuation which he would have been entitled to upon his past service, he being in a particular class in which in that particular way the amount of superannuation has been increased; and therefore it seems to me to be clear enough, looking at it quite independently of the other question, that the five years added under section 4 is just like the twenty-three years actually served—not an addition on account of the abolition of the office, but an addition on account of qualification; and consequently it is not taken out of the 36th section, and it is not prevented from being part of what would fall on the Justices or ratepayers of Middlesex.

There were one or two smaller points about the nature of the appointments of Colonel Colvill—some at earlier times, and some later—but I do not think they were much pressed, and certainly they seem to me to have been completely disposed of; therefore I will not waste time by going into them. I therefore quite agree that the decision below is correct, and that it should be affirmed.

Lord Watson.—I am of the same opinion in this case with that which has been already expressed by my noble and learned friends. I cannot say that the 36th section of the Prison Act of 1877 appears to my mind to be of so extremely doubtful interpretation as it was regarded by the learned Judges of the Court of Appeal. No doubt if you look at the provisions of that Act, and also the provisions of the various Superannuation Acts that have been passed from time to time, there is a great deal of looseness in the way in which the terms "superannuation allowance" and "annuity by way of superannuation allowance" have been used. The expression, it may be said, as used, has not in all cases been very accurate or very appropriate; but I do not think there can be any reasonable doubt as to what its signification is in the fourth paragraph of the 36th section of the Act of 1877.

Turning to the provisions of the Superannuation Act of 1859, I think Mr. Wright's criticisms upon that term were so far justified. I think the term "superannuation allowance" is used to denote an allowance made in respect of service, and calculated according to the period of service upon a higher and lower scale according as the case dealt with by the Commissioners of the Treasury is or is not within section 4 as well as within section 2 of the Act. On the other hand, where an office has been

abolished, or an officer entitled to superannuation allowance has retired in order to make way for the reorganisation of the public department to which he belongs, the consideration given to him in respect of his removal or retirement is termed in the statute an "allowance," and in other parts of it it is dealt with as compensation.

But, whatever may be the meaning of the words as used in the Act of 1859, we are not, in this question between the Treasury and the Justices, dealing with the provisions of that statute at all; we are under the 36th section of the Prison Act. Now at the outset of that, the words an "annuity by way of superannuation allowance" are undoubtedly applied to the ordinary case of the retirement of an officer, but including retirement not necessarily from age, but possibly from injuries received in the actual execution of his duty, or from sickness, and so on. Then follows the provision in the second paragraph of that section with regard to the case of retirement or removal such as is dealt with by the 7th section of the Act of 1859; and the provision made in the statute of 1877 is that cases of prison officers coming within that shall be dealt with in manner provided by the Superannuation Act of 1859; and if the enactment had ended there, there would have been some room for applying the argument which was addressed to us on behalf of the appellants; but when you come to the 4th section, which is really the material part of the clause in the present case, it is perfectly clear that the Legislature, by the words "annuity by way of superannuation allowance or gratuity," intended to include not only allowances made in respect of service and calculated by duration of service, but also allowances made in respect of abolition of office and enforced retirement in order to make way for improvements in the organisation of officer's department, because it provides that such annuity, when apportioned, shall not be apportioned as a whole, but that in separating the amounts that are to be severally borne by the Treasury on the one hand and the old prison authority on the other, you are to lay out of the account altogether that part of the allowance which has been added by reason of the abolition of office or the compulsory retirement of the officer.

Now that section not only points to the very wide meaning which the Legislature obviously intended to give to the words "annuity by way of compensation allowance," but, to my mind, it goes a step further. It indicates that it is to be the duty of the Treasury in giving an allowance to one who has been an officer of the old prison authority, to give him the total sum upon different considerations: to give him, first, an allowance in respect of the term of service, if any, to which he is entitled, and then to add to it a special allowance under section 7, irrespective of service, and on account solely of abolition of office or compulsory retirement. If that were not given effect to by the Treasury it would be impossible, so far as I can see, to arrive at the just sum which is to be apportioned as between the Treasury and the Justices.

Now the provision of that 4th clause is that the Justices are to bear their due proportion, according to the term of years for which he has served under them, of so much of the annuity or allowance as is payable in respect of service before the commencement of this Act. That clearly refers to the allowance to which the officer might be entitled under section 2 of the Superannuation Act, because that, in terms of section 2, is an allowance granted to a person who has served in an established capacity in the permanent civil service of the State. But what is added to that under section 4 of the Act of 1859 is quite as much an allowance in respect of service as the allowance given him under section 2. As I read it, section 4 is not a separate and independent enactment, giving a distinct allowance for distinct considerations, but an enactment intimately connected with section 2, giving an allowance upon an increased scale to officers in whose cases for the due performance of the duties of their office higher qualifications are required than in ordinary circumstances. The provision of section 4 is not that an addition shall be made or a separate allowance given, but that in computing the amount of superannuation allowance which may be granted to him under the foregoing section of the Act there shall be added a

certain number of years. The provision is made, not for the purpose of giving a separate allowance, but for the purpose of giving an additional item, leading to an increased total sum in computing the provision under section 2 of the statute.

Well, that being so, I think it perfectly clear upon these considerations that section 36 of the Act makes it incumbent on the Justices to bear that proportion of the retiring allowance of Colonel Colvill which the judgment of the Court of Appeal lays upon them.

But then a very ingenious argument was raised, and more firmly insisted upon at your Lordships' bar than it seems to have been before the Court of Appeal, to this effect, that under section 7 it is incumbent on the Treasury when they give an allowance to an officer who has been removed or compulsorily retired for the purposes in that section stated, to proceed by means of a special minute, and that special minute must be laid before Parliament. Now I do not think it necessary for the purposes of this case to state what my own views are of the just construction of that section. That is a question which it does not appear to me that the Justices, the appellants, are entitled, or have any right, to raise in the present case. The enactments with regard to a special minute appear to me to be plainly directory. I do not think it was intended that it should be a condition precedent of an arrangement made by the Treasury with respect to a retirement of a prison officer, or any other civil servant whose case falls within the 7th section of the statute, that he should have the implied assent of Parliament from the presentation of such a minute, and, I suppose, its lying unchallenged on the table of either House of Parliament for a certain period. That was not the intention of the provision. It was not intended to take away from the Commissioners of the Treasury the power of making these arrangements. The provision is that, for the information of Parliament, a minute containing the special reasons for granting a large allowance to a civil servant in such circumstances shall be laid upon the table, it being of course within the power of one of the Houses of Parliament to deal as they choose in Committee of Supply with the allowances that are made by the Treasury. Therefore it appears to me that we must here assume, and I do assume, that everything was rightly done, and certainly that it is not within the competency of the appellants to challenge what was done by the Treasury in making an addition, as I think the Act of 1877 directs them to do, to the salary of Colonel Colvill in respect of his having been removed in order to provide for the better organisation of the department over which he so long presided.

I therefore agree with your Lordships that the judgment under appeal ought to be affirmed, with costs.

Lord FitzGerald.—There was a real and substantial question in the case very much discussed in the Court below and at your Lordships' bar. That was, whether the Justices were liable to any portion whatsoever of this grant of an annuity to Colonel Colvill under the terms of section 36 upon the true construction of them. But the argument of Mr. Wright, I think, was met very firmly in the Queen's Bench Division by Mr. Justice Stephen, and also in the Court of Appeal, with some little shade of hesitation by Lord Justice Lindley. Your Lordships have adopted the views of both the Divisional Court and the Court of Appeal, and in your Lordships' views I entirely concur. Now it is very agreeable in also adopting your Lordships' solution of the various difficulties that the ingenuity of Mr. Wright has raised in his argument here, to be able to come to the conclusion that, assuming the construction of section 36 as adopted by your Lordships to be the true one, the Justices are only called upon to pay exactly what they ought to pay and not one farthing more. It is true that Colonel Colvill did go through a short service after the Prison Act had come into operation, but no allowance whatever was made in respect of that—I think it was four months. They took the twenty-three years of actual service before the Act, and superadding the five years' under section 4, that made the twenty-eight sixtieths which they allowed him for the service before the Act, and nothing more; and in the allocation of the entire annuity that is exactly

what the Justices are required to pay. Then the remaining portion, as to which it is said the special minute required by section 7 ought to have been granted, the ten sixtieths, does not fall upon the Justices; they are not injured by it. They are not affected by that ten sixtieths, and in my opinion they have no right whatever to enquire whether that ten sixtieths was or was not justified by a special minute under section 7. On these grounds I entirely agree with your Lordships that the appeal should be dismissed.

Mr. Wright.—Before the question is put, would your Lordships permit me to submit, with I think the assent of the Solicitor-General, that this is not one of the class of cases in which the Crown ever receives or pays costs?

Mr. Danckwerts.—The Crown has lately insisted upon the same principle, and I do not suppose we are now in a position to ask for costs.

THE LORD CHANCELLOR.—You do not press for costs.

Mr. Danckwerts.—No, my Lord.

Order appealed from affirmed and appeal dismissed.

Solicitors—The Solicitor to the Treasury, for the Crown; Nicholson & Herbert, for the Justices.

[IN THE COURT OF APPEAL.]

1884. May 17. } DINNING *v.* THE SOUTH SHIELDS UNION.

Poor—Husband and Wife—Maintenance of Married Woman—Amount which Husband can be ordered to pay—31 & 32 *Vict. c.* 122. *s.* 33.

[For the report of the above case, see 53 Law J. Rep. M.C. 90.]

[IN THE COURT OF APPEAL.]

1884. Aug. 4. } CRIPPS *v.* JUDGE.*

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1, *s.* 2—*Defect in Condition of Plant.*

The Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *gives a workman a right of action against his employer for personal injury caused by reason of any defect in the condition of the works, machinery, or plant connected with or used in the business of the employer which arises from the negligence of the employer. This provision applies to works and plant consisting of a combination of several pieces of plant, each of which is in itself sound and fit for use, but which when combined form unsound and defective plant, so that injury is caused to a workman using it.*

Heske *v.* Samuelson (*ante*, p. 45) *approved.*

Appeal from the judgment of the Queen's Bench Division refusing a rule *nisi* to enter a nonsuit or for a new trial.

Action in the County Court to recover damages under the Employers' Liability Act (43 & 44 Vict. c. 42) for injuries received by the plaintiff when employed by the defendant as a workman.

It appeared that the plaintiff was employed by the defendant, a builder, to do some work upon a house. In order to enable the work to be done a scaffold was put up under the direction of the defendant, which was supported by and rested on a ladder. The plaintiff had in the course of his employment to descend the ladder, and as he did so the ladder broke in two, and he fell and was injured.

At the trial the jury found that the ladder was insufficient for the purpose for which it was used, that the scaffold and ladder were erected under the instructions of the defendant, that there was evidence of neglect on the part of the employer, and judgment was given for the plaintiff.

The defendant having been refused a rule for a nonsuit or for a new trial by the Queen's Bench Division obtained such a

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

rule in the Court of Appeal, and that rule now came on for argument.

Morten shewed cause, and cited *Heske* v. *Samuelson* (1) and 43 & 44 Vict. c. 42. s. 1, sub-ss. 1 and 2; s. 2. sub-s. 1 (2).

Ruegg, for the defendant, contended that *Heske* v. *Samuelson* (1) was wrongly decided, and that there was no evidence to support the findings of the jury.

BRETT, M.R.—The whole arrangement of things used in this case was used for the purpose of making a scaffold, and in order to enable the workmen to get up that scaffold. That arrangement was made under the superintendence of the defendant, and it was under the personal control of the defendant. Each part of that arrangement was, it seems, in itself sound; but the question whether the whole together was sound or unsound was left to the jury, and they answered that question in the negative. This action is brought under the Employers' Liability Act, 43 & 44 Vict. c. 42. s. 1, sub-s. 1 (2), and that portion of that statute has received a judicial construction in the case of *Heske* v. *Samuelson* (1), in which case Lord Coleridge said, "The question is whether the fact that the machine is unfit for the purpose for which it was applied constitutes a defect in its condition within 43 & 44 Vict. c. 42;" and he held that if it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act. I agree in that interpretation, and think that the test given in that case covers this case, so that this rule must be discharged.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—Two questions arose in this case. The first was whether there was any defect in the condition of the plant used; and the second was whether there was any evidence to shew that the defect arose from the negligence of the employer. The jury answered these questions in the affirmative, so that the plaintiff is entitled to recover under 43 & 44 Vict. c. 42.

Rule discharged. Judgment for the plaintiff.

Solicitors—Shaen & Roscoe, for plaintiff; Watson, Sons & Room, for defendant.

(1) *Ante*, p. 45; Law Rep. 12 Q.B. D. 30.

(2) 43 & 44 Vict. c. 42. s. 1: "Where . . . personal injury is caused to a workman (1) by reason of any defect in the construction of the ways, works, machinery, or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence . . . . the workman . . . . shall have the same right of compensation and remedies as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

Section 2: "A workman shall not be entitled under this Act to any right of compensation or remedy against his employer in any of the following cases—that is to say, (1) under sub-section 1 of section 1, unless the defect therein mentioned arose from or had not been discovered owing to the negligence of the employer . . ."

1884. Feb. 25. March 5.

RANDALL *v.* LITHGOW. THE EQUITABLE FIRE INSURANCE COMPANY (*garnishees*). GREEN AND ANOTHER, *claimants.*

Practice—Garnishee Order—Default of Appearance—"Debt" attachable—Interpleader Issue—Unliquidated Claim—Award after Date of Garnishee Order.

Judgment for the sum of 127*l.* 5*s.* 6*d. was recovered against a person having a claim for unliquidated damages under a fire policy; and an ex parte garnishee order was served on the fire insurance company, attaching all debts owing or accruing from them to the assured. No cause was shewn against the order, and it was made absolute. The sum of* 248*l. was subsequently awarded to the assured on his claim after he had executed an assignment of all his property to trustees for the benefit of his creditors:*—Held, *that the garnishee order not having been appealed against and set aside, the judgment creditor, although the debt was not an attachable debt at the date of the order, was entitled to issue execution for* 127*l. under the garnishee order, and was not bound to interplead with the trus-*

tees to whom the debtor had assigned his interest under the award.

This was an appeal from chambers against an order directing the sum of 127*l.* 5*s.* 6*d.*, received by the plaintiff from the garnishee, to be paid into Court, and directing an issue to be tried between Randall, the plaintiff, and Green and Jebbutt, claimants, to try the question whether the said sum paid into Court was the property of the plaintiff or the claimants.

On the 29th of March, 1883, the plaintiff Randall recovered judgment against the defendant Lithgow for 127*l.* 5*s.* 6*d.*, and obtained the usual *ex parte* garnishee order, attaching all debts owing or accruing from the Equitable Fire Insurance Company to the judgment debtor.

This order was duly served upon the insurance company, and they did not appear to shew cause against a final order. Accordingly, on the 7th of April, 1883, an order absolute was made, directing the insurance company as garnishees to pay forthwith to the plaintiff the debt due from them to the judgment debtor, or so much thereof as might be sufficient to satisfy the plaintiff's judgment debt; and that in default thereof execution might issue for the same. No attempt was at any time made by the insurance company to set aside or vary the garnishee order of the 7th of April. The plaintiff, however, took no immediate steps to enforce this order, and made no further demand upon the insurance company until the 14th of December, 1883. On the 14th of December, 1883, an award had been made in favour of Lithgow, the judgment debtor, for 248*l.* 2*s.* 11*d.*, against the insurance company.

The plaintiff demanded payment from the company of the sum of 127*l.* 5*s.* 6*d.* out of the sum of 248*l.* 2*s.* 11*d.* awarded to Lithgow under the said award. The insurance company objected to pay the plaintiff, upon the ground that the whole 248*l.* 2*s.* 11*d.* was claimed by Messrs. Green and Jebbutt under an assignment by Lithgow for the benefit of his creditors made subsequently to the garnishee order being made absolute; and the plaintiff threatening to issue execution, the insurance company, upon the 8th of January, 1884, took out a summons entitled in the action of *Randall* v. *Lithgow*, with themselves as garnishees and Green and Jebbutt as claimants, calling upon all parties to appear and state the nature and particulars of their respective claims to the moneys the subject-matter of that action.

This summons was dismissed by the Master; whereupon the plaintiff pressed his demand and threatened to issue execution; and the insurance company, under pressure of this threat and under protest, paid the plaintiff 127*l.* 5*s.* 6*d.*, and gave notice of appeal from the Master's decision to the Judge, and the Judge reversed the decision of the Master and made the order now appealed from, ordering the plaintiff to pay the 127*l.* 5*s.* 6*d.* into Court to abide further order, and that the plaintiff Randall and the claimants Green and Jebbutt should proceed to the trial of an issue whether the sum of 127*l.* 5*s.* 6*d.* paid into Court was the property of the claimants Green and Jebbutt, or of the plaintiff Randall, and which of them was entitled thereto.

Bankes, for the plaintiff.—Until set aside the garnishee order is good, and the defendant could only assign subject to it. It is too late to say the debt was not attachable now. That should have been done by appeal from the garnishee order. After the order is made absolute, and whilst it remains unappealed from, the garnishee can only be freed from his liability to the judgment creditor by payment by compulsion of law—*The Mayor, &c., of London* v. *The London Joint Stock Bank* (1).

Reginald Brown, for the garnishees.—The garnishee order was obtained on an affidavit that was not true. There was not at the date of the order any debt owing or accruing. The company are entitled to interplead, as on the one hand the judgment creditor threatens execution, on the other hand the trustees threaten them with an action.

McCall, for the claimants.

Bankes, in reply.

Cur. adv. vult.

(1) 45 Law J. Rep. C.P. 213; Law Rep. 1 C.P. D. 1.

Randall v. *Lithgow.*

The judgment of the Court (2) was (on March 5) read by

WILLIAMS, J.—The question now is whether the interpleader order is correct. In determining this question some things may be considered as clear. In the first place, it is clear that the claim of the judgment debtor Lithgow against the insurance company, which resulted in an award in his favour on the 14th of December, 1883, for 248*l.* 2*s.* 11*d.*, was not at the date of the garnishee order in April, 1883, an attachable debt. It was not a debt either present or accruing. It was a mere claim for unliquidated damages, and was not the subject of attachment in the hands of the insurance company.

Secondly, it is clear that the plaintiff Randall obtained on the 7th of April, 1883, a regular and, until reversed, a valid order, attaching in the hands of the insurance company a debt to the amount of 127*l.* 5*s.* 6*d.*, admitted, or at least not disputed, to have been due from them to the judgment debtor. This order remains valid and undisturbed to this day; there is nothing on the face of this order to earmark the debt due to Lithgow out of which the 127*l.* 5*s.* 6*d.* is to be paid, still less to identify it with Lithgow's claim for damages against the insurance company.

There is no reason to doubt that both the plaintiff and the insurance company had this claim in contemplation when the plaintiff applied for, and the insurance company submitted to, the garnishee order of the 7th of April; but that is immaterial. The order was made upon the tacit admission by the insurance company that they were indebted to Lithgow on the 7th of April, 1883, in an amount equal to the judgment debt due from Lithgow to the plaintiff for 127*l.* 5*s.* 6*d.*

Then the question arises whether the insurance company, being pressed with these rival claims, are entitled to be relieved from their difficulty by the process of interpleader. We think that they are not. The plaintiff is in the position of a judgment creditor of the insurance company for 127*l.* 5*s.* 6*d.* under his order of the 7th of April, and unless that judgment or order has been satisfied in whole or in part he is entitled to issue execution against the insurance company for that amount.

It is a fallacy to suppose that the claimants Green and Jebbutt can have any claim whatever to 127*l.* 5*s.* 6*d.*, or that the plaintiff has any claim to any part of the 248*l.* 2*s.* 11*d.* specifically. The insurance company have placed themselves in their present difficulty by allowing the order of the 7th of April, 1883, to be made against them by default, instead of appearing and shewing cause against it, and stating, as the fact was, that there was no debt due or accruing from them to the judgment debtor Lithgow.

The order appealed against must therefore be reversed and the order of the Master dismissing the summons must be restored, and the insurance company must pay to the plaintiff the costs of the appeal to the Judge and of this appeal.

Appeal allowed, with costs.

(2) Denman, J., Manisty, J., and Williams, J.

Solicitors—Ralph Raphael, for plaintiff; Linklater & Co., for garnishees; Price & Sons, agents for A. Andrew, Northampton, for claimants.

1884. May 27. THE SCHOOL BOARD FOR LONDON (*appellants*) *v.* DUGGAN (*respondent*).

Elementary Education Acts—By-laws under 33 *&* 34 *Vict. c.* 75. *s.* 74—*Parent not causing Child to attend School—Reasonable Excuse.*

[For the report of the above case, see 53 Law J. Rep. M.C. 104.]

on his behalf that the plaintiff being a married woman could not maintain an action in her own name without joining her husband as plaintiff after the passing of the Married Women's Property Act, 1882, to recover damages in respect of a tort done to her in 1878, that is, before that Act came into operation.

C. H. Anderson (with him *E. Clarke, Q.C.*), for the defendant.—The plaintiff cannot maintain the action in her own name in respect of torts committed in 1878, after the passing of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), but before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation. Prior to the Act of 1882 it was necessary to make the husband a party, and the damages recovered became the property of the husband. Moreover, the objection as to the non-joinder of the husband could be taken by plea in abatement, which shews that the wife could not sue alone. Although pleas in abatement are abolished, and the objection has not been taken in the defence, it can be taken at the present stage of the proceedings. Under section 11 of the Act of 1870 a married woman could maintain an action in her own name for the protection of her earnings, which are her separate property —*Summers* v. *The City Bank* (1); but she was not entitled to maintain an action in her own name under that Act unless she could shew that she had a separate cause of action. Section 1, sub-section 2, of the Act of 1882 merely gives a married woman a right of action in respect of torts committed after the passing of the Act; and section 22 would also tend to shew that to hold otherwise would be to construe the Act as retrospective, inasmuch as the damages recovered are the property of the husband. It has been decided that the Act of 1882 applies to torts committed before the passing of the Act—*James* v. *Barraud* (2) and *Severance* v. *The Civil Service Supply Association* (3); but those decisions are in conflict with the recent case of *Weldon* v. *Rivière* (4), where it was held that an action for an assault committed on a wife during coverture before the passing of the Act could not be maintained by a married woman without joining her husband. Next, the plaintiff cannot maintain the action in her own name in respect of the libel unless she shews special damage to herself —*Lynch* v. *Hyde* (5).

He also cited Order XXI. rule 20, *Werderman* v. *Société Générale D'Electricité* (6), *Richbell* v. *Alexander* (7), *Butler's Note to Co. Litt.* (8), *Sheppard's Touchstone*, tit. "Release" (9), *Beckham* v. *Drake* (10), *Ramsden* v. *Brearley* (11), and *In re March, Mander* v. *Harris* (12).

The plaintiff in person.

[BRETT, M.R.—The Court will consider whether it will be necessary to call upon the plaintiff.]

Cur. adv. vult.

The following judgments were delivered on July 31 :—

BRETT, M.R.—We do not think it necessary to call upon the plaintiff for any answer. The question to be determined at this point of the case is whether, assuming that the jury will be justified in finding that the plaintiff has been maliciously libelled, and by the direction of the defendant has been unjustifiably assaulted, she can maintain an action brought in her own name in respect of those injuries without making her husband a party to it. I am of opinion that she can. The cause of action is in each case for injury personal to the plaintiff herself; and no action could in either case have been brought without making her a party to it. Her husband could not in either case have brought an action to

(1) 43 Law J. Rep. C.P. 261; Law Rep. 9 C.P. 580.
(2) 49 Law Times, N.S. 300.
(3) 48 Law Times, N.S. 485.
(4) *Ante*, p. 448; not reported when the present case was argued.
(5) 9 H.L. Cas. 577, 598, 599.
(6) Law Rep. 19 Ch. D. 246.
(7) 10 Com. B. Rep. N.S. 324; 30 Law J. Rep. C.P. 268.
(8) At p. 351*a*.
(9) At p. 333.
(10) 2 H.L. Cas. 579.
(11) 44 Law J. Rep. Q.B. 46; Law Rep. 10 Q.B. 147.
(12) 52 Law J. Rep. Chanc. 680; Law Rep. 24 Ch. D. 222.

recover damages in respect of any of the three causes of action in his own name without having joined the wife as a party; but the wife might at any time have sued for and recovered damages in her own name, and without joining her husband, in respect of these causes of action, for the defendant could not have pleaded in bar, but only in abatement. That is an admission that she had what at that time was called a meritorious cause of action, a cause of action which was entirely personal to herself, and the husband's name was joined only for the sake of conformity, so that he himself had no cause of action. If the wife had died before the action was brought, the husband could not have sued in respect of the personal injury done to her, for the cause of action was so entirely that of the wife alone that he could not have sued without making her a party. If she died pending the action, the husband could not proceed with it. More than that, any damages recovered in respect of the cause of action belong in the first place to the wife alone. Moreover, the damages, if they had been recovered in the name of the wife alone, and if the husband had not done anything to reduce them into possession, would have belonged to her, and would not have passed to his executors. It is true that the husband had power to reduce the damages into possession; but he could not do anything with them before they were recovered. It seems therefore to me that this action was really the action of the wife, subject, however, to the right of the defendant, if he should so choose, to insist upon the husband being made a party. I say that only to shew that the damages do not belong to the husband before they are actually recovered. That being the state of things, the question now is whether by virtue of section 1, sub-section 2, of the Married Women's Property Act, 1882, the plaintiff is entitled to sue alone, so that now, not even by a plea in abatement, or by any other process, can the plaintiff's husband be made a party either by the defendant or by the husband himself. Sub-section 2 is to be read thus: "A married woman shall be capable of suing either in contract or in tort or otherwise in all respects as if she were a *feme sole*; and her husband need not be joined as a party to any action brought by her; and any damages recovered by her in any such action or proceeding shall be her separate property." That sub-section therefore deals with an action of tort, so that after the commencement of the Act a married woman may bring an action of tort in her own name to recover damages, and the damages, when recovered, are to be her separate property. The present action, which is an action of tort, was brought after the Act came into operation. The clear and obvious grammatical construction of the Act is that the wife may bring an action of tort in which the husband has no right; that she shall be entitled to recover damages, which are to be her separate property, and which, until recovered, do not belong to the husband at all. It is said that such a construction will give a retrospective effect to the Act, because it is said that the cause of action arose before the Act came into operation. But, although it did then arise, there is nothing in the Act about causes of action, but only about procedure. Therefore there is not anything to limit that which is the grammatical sense of the words to causes of action occurring after the Act came into operation, although it would have been easy to have used words to that effect if such had been the intention of the Legislature. An action, therefore, to recover damages which did not belong to the husband until recovered, even if they then belonged to him, and an action brought to recover damages after the commencement of the Act in respect of a cause of action which accrued before it was passed, come within the plain words of the sub-section. It would be necessary to distort the grammar in order to get at the suggested interpretation, and there is no reason why that should be done. On the contrary, what I have stated shews that it was probably the intention of the Legislature that an action should be maintained afterwards. It therefore seems to me that, by virtue of section 1 alone—and that is all that it is necessary for us to consider—this action was properly brought by the plaintiff in her own name, and the damages, if she recovers any, will be her own property. I do not see anything either in section 22 or in any other section

to control the clear and obvious sense of the words used in section 1, sub-section 2.

BOWEN, L.J.—This is an action of tort for injuries done to the person of a married woman during coverture, and in which before the Judicature Acts the husband and wife ought both to have been joined. The husband could not have sued alone for damages in respect of injuries done to his wife, but might have sued alone for consequential damage to himself caused by such injuries. If the wife had sued alone, the defendant could only have objected by a plea in abatement, which would have obliged her to join her husband; but if such a plea was not pleaded, the action ran its ordinary course, and it would not have been a substantial bar even if the woman sued alone. The Judicature Acts and rules, under which pleas in abatement were abolished, do not to my mind deprive a defendant of the right which he formerly had to insist that a married woman should join her husband, if he thought it to his advantage so to do, but only altered the mode in which the objection is to be taken, leaving it to the defendant to enforce the objection, either by a summons to stay the action until the husband has been joined, or, if put forward as a defence, to ask the Judge at the trial for leave to amend, if the case was one for amendment. If, therefore, this action of tort is not affected in some way or other, it is clear that the defendant is at liberty to take the objection that the married woman is not at liberty to sue alone. The Married Women's Property Act, 1882, does, however, seem to have affected the question; for by sub-section 2 of section 1 of that Act it is provided that in the future a married woman is to be capable of suing, and that it is not within the power of the opposite party to insist that she is not a proper person to sue alone. It was contended that the wrong was committed before the Act came into operation, and that if the Act were to be construed according to the plaintiff's contention, as clothing her with the capacity to sue for wrongs done before the commencement of the Act, it would be giving to the Act a retrospective operation and an effect prejudicial to the vested right which the husband had before the Act to be joined with the wife, and to reduce the damages into possession. It is certainly far from desirable to construe an Act so as to give it a retrospective effect; but it is to be remarked that the section which we have to construe seems to deal with the capacity of the wife to sue as plaintiff rather as a matter of procedure than to deal with any vested rights at all, until we come to that part of the section which relates to the damages which a wife shall recover in respect of her separate action. The present case seems, in principle, to fall within that class of statutes which deals with procedure rather than with vested rights, and which ought so to be construed as not to affect those rights. It is to be observed, however, that the section does not interfere with the right of a husband to sue for a tort done to his wife, but only relieves the wife of the disability to sue alone, and the damages which are made her separate estate are not damages recoverable and to be recovered in an action brought in the joint names of the husband and wife, but only in such an action as is brought by her alone. The words of section 1, sub-section 2, are merely that "any damages or costs recovered by her in any such action or proceeding shall be her separate property;" and such an action or proceeding is brought by her as a *feme sole*. The effect of that sub-section seems to me simply to get rid of the disability of the wife to sue alone, so far as procedure is concerned, and to give her the fruits of the action which she brings as a *feme sole*. I do not see that it would be a violent construction of the section or at variance with the ordinary canons of construction to assume that it gives the wife power to sue after the Act in respect of a tort done before the Act was passed. I am therefore of opinion that the plaintiff can, by virtue of section 1, sub-section 2, sue alone for the tort suffered by her before the Act came into operation.

FRY, L.J.—I take the same view as to the effect of the Married Women's Property Act, 1882. I am not insensible that there is a certain difficulty in applying the provisions of section 1 to torts which accrued before the commencement of the Act, because it seems to me that the section

does affect damages recovered in respect of such torts, and has made damages which before the Act might have been reduced into possession by the husband, the property of the wife; so that a husband may not now be capable of reducing them into possession. The language of the section, which is too plain to enable me to come to any other conclusion, and which enables the wife to bring an action, is not confined to torts which accrued after the passing of the Act. It was said that section 22 preserves all the rights of the husband in respect of these causes of action, and that it is inconsistent with the saving of these rights to allow the wife to sue in respect of a tort committed before the Act was passed. It seems to me that section 22 applies to the repealed Acts of 1870 and 1874, and to the saving of a husband's rights under those Acts, but does not extend to any rights of the husband in respect of torts independently of those Acts. It is enough in the present case to say that the action is well within the words of section 1, sub-section 2, and the plaintiff is therefore entitled to recover.

BRETT, M.R.—I should also like to reserve my opinion as to whether the damages are not the separate property of the wife, even if the husband should be joined as a party.

Appeal dismissed.

Solicitor—B. H. Van Tromp, for defendant.

1884. May 26. } UNITED LAND COMPANY *v.* TOTTENHAM LOCAL BOARD.

Highway—Expenses of diverting Footways — Costs of independent Solicitor retained by Local Board—Highway Act, 1835 (5 & 6 *Will.* 4. *c.* 50), *ss.* 84 *and* 101.

[For the report of the above case, see 53 Law J. Rep. M.C. 136.]

[IN THE COURT OF APPEAL.]

1884. May 8, 30. } READ *v.* ANDERSON.*

Contract—Principal and Agent—Betting—Agent employed to make Bets in his own name—Repudiation of Bet before Payment—Implied Contract to indemnify— 8 & 9 *Vict. c.* 109. *s.* 18.

The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's own name. After the plaintiff had so made some bets, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day the plaintiff, who was a member of Tattersall's, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connection with racing matters, and he then sued the defendant for the amount so paid: —Held, *by* BOWEN, L.J., *and* FRY, L.J. (BRETT, M.R., *dissentiente*), *that he was entitled to recover the amount so paid.*

Appeal from the judgment of Hawkins, J., after trial without a jury.

The case is reported 52 Law J. Rep. Q.B. 214.

The action was brought to recover 175*l.*, the amount of three bets made by the plaintiff in his own name on behalf of the defendant, and paid by the plaintiff to the winners. The plaintiff was a turf commission agent, and a member of Tattersall's subscription-rooms. In June, 1881, the plaintiff, who had been in the habit of backing horses for the defendant, received from the defendant the following telegram: "Put me fifty on Limestone, first race; pony all Archer's mounts; fifty Sword Dance; hundred Elf King, Wokingham; hundred Red Rag filly, Castle Stakes. Reply." The plaintiff, acting on this telegram, backed in his own name Elf King for 100*l.*, Sword Dance for 50*l.*, and Valentino, one of Archer's mounts, for 25*l.* None of these horses won, and the bets the subject of this action were lost. On the same day the defendant repudiated the bets, on the ground that the telegrams sent by the plaintiff informing the defendant of the bets made for him had not been handed

* *Coram* Brett, M.R.; Bowen, L.J., and Fry L.J.

in at the telegraph office until after the races had been run, and he refused to pay the amount of them.

On the settling day the plaintiff paid the three bets in question to the winners of them. Had he not done so he would have been a "defaulter" within the meaning of the 3rd rule of Tattersall's new subscription-room; and if, upon complaint made to the committee of the room, the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it; and by the 50th of the rules of racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets, he would, until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the rules of racing as to entering and running horses. The consequences of becoming a defaulter would therefore have been very serious to the plaintiff. The defendant repudiated his liability on the ground that the plaintiff had not complied with the universal custom requiring him to send a telegram before the race stating the particulars of the bets made by him on behalf of the defendant; and further contended that the bets were wagering contracts, that he had never given the plaintiff any authority to pay them, and that, if he had, he had revoked the authority before the money was actually paid.

Hawkins, J., found that there was no such expressed condition nor any such custom as that contended for; that the act of repudiation, if any, was inoperative; that the defendant was bound to indemnify the plaintiff; and he gave judgment for the plaintiff.

The defendant appealed.

Petheram, Q.C., and *Mitcalfe Dale*, for the appellant.—The contract between the plaintiff and the defendant was that the plaintiff should make bets on behalf of the defendant; there was therefore a contract of employment, and a contract that, unless the authority to pay the bet was revoked, the defendant would repay the plaintiff. There was in this case a revocation by letter, so that the authority to pay was revoked in fact; and the contention on behalf of the defendant is that there was a good revocation in law. The only question is whether the defendant could revoke the authority once given. *Hampden* v. *Walsh* (1) and *Diggle* v. *Higgs* (2) establish that, in the case of a stakeholder, the authority given to pay over the money can be revoked before it had been paid. *Thacker* v. *Hardy* (3) and *Rosewarne* v. *Billing* (4) were cited.

Finlay, Q.C., and *McCall*, for the plaintiff.—The first question is whether the learned Judge has drawn the correct inference as to the contract between the plaintiff and the defendant. Whether or not the contract can be described as one of agency, still there was a contract that, if the plaintiff paid the bets, the defendant would repay him. There is no doubt that the plaintiff would suffer injury in his business if he did not pay the bets which he made on behalf of the defendant; and whether the liability incurred by him was a legal liability or not, is immaterial. The only question is whether there was sufficient consideration to support the contract, and it is submitted that there was.

[BRETT, M.R.—Ought the Court to infer an implied contract on the part of the principal that he will not revoke the authority?]

Yes, since the defendant in fact asks the plaintiff to make himself personally liable upon the contract.

[BRETT, M.R.—But he does not incur any liability which can be enforced at law.]

The distinction that the liability must be one which could be enforced at law has not been considered to be the test; it is sufficient that a benefit results to the party promising, or if the person whom he asks to act for him sustains thereby any loss or inconvenience, or subjects himself to any charge or obligation, however small the benefit, charge, or obligation may be——*Barber* v. *Fox* (5); so that in this case

(1) 45 Law J. Rep. Q.B. 238; Law Rep. 1 Q.B. D. 189.

(2) 46 Law J. Rep. Exch. 721; Law Rep. 2 Ex. D. 422.

(3) 49 Law J. Rep. Q.B. 289; Law Rep. 4 Q.B. D. 685.

(4) 15 Com. B. Rep. N.S. 316; 33 Law J. Rep. C.P. 55.

(5) 2 Wms. Saund. 137.

Read v. *Anderson, App.*

the liability to which the plaintiff would be subjected if he did not pay the bets which were lost supplies a substantial sanction and a sufficient consideration for the contract. There is here an implied contract of indemnity; and if there is any limitation or qualification in that contract, it is for the defendant to establish it; and, as Erle, C.J., said in *Rosewarne* v. *Billing* (4), if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it.

Cur. adv. vult.

BRETT, M.R. (on May 30).—The plaintiff sues the defendant in order to recover the amount of three bets made by the plaintiff in his own name at the request of the defendant. These bets were lost, and the plaintiff paid the amounts to the winners.

This case was tried without a jury, and Mr. Justice Hawkins has found certain facts; but I do not assent to the view that we are bound to adopt the learned Judge's findings of fact. I think we must look at the facts ourselves, for when there has been no jury the Court of Appeal can reverse the findings as to matters of fact.

The defendant makes bets, and, wishing to do so at a certain race meeting, he hired the plaintiff to bet for him, but to bet in the plaintiff's own name, and he gave him authority to pay and to receive the amount of bets won or lost. That seems to me to be a contract of principal and agent, and not one of purchase and sale, the terms of the contract being, as it seems to me, that the agent is to make bets, that the principal is to pay commission, and that the commission is paid for making the bets. The power which a principal has is that, unless he precludes himself from so doing, he can revoke the authority given by him to the agent before the authority has been fulfilled. If this be so, then the defendant had power to revoke the authority which he had conferred on the plaintiff. In this case the defendant did so, and that before the bets were paid; but the plaintiff sues to recover the amount of the bets which he has paid notwithstanding the revocation. Mr. Justice Hawkins found that where an agent bets in his own name on behalf of a principal, and does not pay the bets which are lost, he becomes what is called a "defaulter," and is then liable to be turned out of certain positions, so that he cannot carry on his business as he has been in the habit of carrying it on before, and that he therefore suffers loss and inconvenience. Will, then, the law imply in such a case an undertaking on the part of the principal that he will not revoke the agent's authority to pay the bets if lost? Where authority is given to an agent to do a thing in his own name on behalf of his principal in such circumstances that, if the authority were withdrawn, the agent would still be bound in law, there it has been held that the principal is not entitled to revoke the authority given by him to the agent.

But suppose that this agent had refused to pay the bets which he had made for the defendant when it turned out that they were lost, the winners of those bets could not have made him pay them, nor could they have forced the principal to pay them. If the bets had been winning bets the agent could not have enforced the payment of them, nor could his principal have done so, for the law will not assist the recovery of money won on bets.

The plaintiff contends that the law gives him power to enforce payment, and says that he is entitled to enforce the payment from the defendant of the amount of these bets which have been lost; but that, as it seems to me, is to attempt to do what the law says shall not be done. It is said that if he cannot do so he would suffer loss in his business. Now I know that his business is not illegal, but it is a business with regard to which the law says that contracts made in it are not to be enforced at law. This being so, I think the law should disregard the inconvenience to which the evidence shews the plaintiff would be subjected if he did not pay these bets. I am of opinion that the exception to the rule that the principal has the power of revocation must be confined to cases where if the principal were to revoke his authority the agent would be so placed that the contract could be enforced against him, and therefore I think this appeal should be allowed.

BOWEN, L.J.—I am unable to agree with the judgment of the Master of the

Rolls. The defendant purported to revoke the plaintiff's authority to pay the bets which had been made by the plaintiff on behalf of the defendant, but made, according to custom, in the plaintiff's own name.

Could the defendant retract the authority given by him to the plaintiff after the plaintiff had incurred liability under that authority? This transaction is a contract between a principal and an agent. The general rule in such a case is that, unless the principal is precluded by the terms of the contract or by his own conduct, he may revoke the authority of his agent; but if he is so precluded, then he cannot do so, but must indemnify the agent. The question here is one of fact, and it is as to the nature of the contract. In general, if a principal employs an agent and involves him in liability, the principal cannot retract the authority; but it is true that here there is no legal liability imposed on the agent, as bets cannot be enforced at law. There is, however, a usage, known to both these parties, that a turf commission agent backs horses in his own name and becomes himself responsible for the amount of the bets made.

There was evidence as to the consequences which would ensue if the agent were not to pay the bets when lost, and I think that the evidence supports this finding of Mr. Justice Hawkins, and that the defendant must be taken to have said in effect to the plaintiff that the plaintiff was to take on the defendant's behalf, and for him, the position of being liable to pay bets if lost, or to suffer the penalties which have been stated, and that the defendant must be taken to have directed the plaintiff to take the position on the faith that he, the defendant, would recoup the plaintiff if the bets are lost. I think that the inference is that both parties understood that if the agent had to pay bets which were made and lost, the principal would recoup him. I feel that the fact that the obligation incurred by the agent is not a liability which can be enforced at law does raise a difficulty; but I think that the ground of the liability of the principal to the agent is the fact that the agent has placed himself in a position of difficulty and responsibility at the request of the principal, so that I think the inference to be drawn is that it was a part of the bargain that the defendant should indemnify the plaintiff.

Suppose that a merchant here employs an agent abroad to insure for him by foreign honour policies which could not be sued on here, could the English principal repudiate his liability on such a contract? I think that the contract in such a case would be, that the principal should guarantee the agent that which the agent became bound in honour to pay, and that which he did in fact pay.

It is said that, if this be so, the agent could enforce a payment against his principal which the winner of the bet could not enforce against the agent. But if the agent was directed to pay and has paid, then he can recover, not because payment could be compelled, but because he has altered his position. The plaintiff's business is, it is true, a business of making wagers, and the law does not allow "contracts or agreements, whether by parol or in writing, by way of gaming or wagering," to be enforced by suit, but it does not make the business illegal. The contract in respect of which this action is brought is not a wagering contract; the action is brought because the plaintiff was obliged to pay the bets, or to run the risk of being treated as a defaulter, and because he was put in this position by and on behalf of the defendant. I think therefore the appeal must fail.

FRY, L.J.—I have felt some doubt, as the Master of the Rolls thinks that the plaintiff cannot recover; but I have come to the conclusion that this appeal must fail, and I agree with the reasons given by Lord Justice Bowen.

Judgment affirmed.

Solicitors—Apps, for plaintiff; J. E. & H. Scott, agents for Dale, South Shields, for defendant.

1884. Aug. 7. LONDON LAND COMPANY (LIMITED) v. HARRIS AND OTHERS.

Practice—Transfer of Action—Vendor and Purchaser—Action for Return of Deposit—Counterclaim for Specific Performance.

An action by the purchaser of land for the return of his deposit-money, in which the defendant counterclaims for specific performance, should, if brought in the Queen's Bench Division, be transferred to the Chancery Division.

This was an appeal by the defendants from a decision of Smith, J., in chambers, who refused to transfer this action to the Chancery Division.

The plaintiff contracted to purchase and the defendants to sell certain land belonging to the defendants, and a deposit on the purchase-money was paid by the plaintiff, but, owing to questions as to the title, the contract was not completed.

The plaintiff accordingly brought an action for the return of the money paid as deposit. The defendants put in a defence, and counterclaimed for specific performance of the contract.

Leeke, for the defendants.—The question of specific performance cannot be conveniently tried in this division, from want of the machinery for the purpose such as there is in the Chancery Division—*Storey* v. *Waddle* (1), *Hillman* v. *Mayhew* (2), *Holloway* v. *York* (3), *Holmes* v. *Henry* (4), and 36 & 37 Vict. c. 66. s. 34, sub-s. 3 (5).

Blakesley, for the plaintiff.—The only question is one as to title, a kind of question often tried in the Queen's Bench Division; nor is there any necessity for the machinery of the Chancery chambers. If the defendant thought it so necessary to have that machinery he could have brought his action in that division before he was sued in this division.

POLLOCK, B.—This action is brought for a return of a certain sum paid by the plaintiff as a deposit on the purchase-money of certain land belonging to the defendants and contracted to be purchased by the plaintiff. Although there is a question of title involved, such a claim can be dealt with by the Queen's Bench Division. But the defendants, on the other hand, have counterclaimed, not for damages for the non-fulfilment of the contract, but for specific performance.

It is conceded that, if the defendants had first issued a writ for specific performance, the action must have been brought in the Chancery Division; and also that, if any question had arisen as to the *bona fides* of the counterclaim, this Court would take that into consideration. But it is here admitted that the counterclaim is perfectly *bona fide*.

The plaintiff's claim for return of his deposit could be heard in the Queen's Bench Division, and it would be no answer to say that the Chancery Division is more conversant with questions affecting title to real property. But then there is here a counterclaim, and it is admitted that, if a plaintiff succeeds in an action for specific performance, the Court would in effect give judgment for the plaintiff, subject to a reference to the chief clerk upon the question of title. But the Court has no such officer, nor any machinery for such an enquiry; and therefore the case comes within the decisions that have been cited to the effect that if the action involves the use of machinery which does not exist in this division, but does exist in the Chancery Division, the action must be transferred.

LOPES, J., concurred.

Appeal allowed, with costs.

Solicitors— G. Fletcher Jones, for plaintiff; Mason & Trotter, for defendants.

(1) 27 W.R. 833: Law Rep. 4 Q.B. D. 289.
(2) 45 Law J. Rep. Exch. 334; Law Rep. 1 Ex. D. 132.
(3) 25 W.R. 403; Law Rep. 2 Ex. D. 333.
(4) 25 W.R. 80.
(5) 36 & 37 Vict. c. 66. s. 34: "There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court—
Sub-section 3: "All causes and matters for any of the following circumstances:— . . . .
"The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases."

[IN THE COURT OF APPEAL.]

1884. April 25. } CHRISTIE *v.* BARKER.*

Rent-charge—Action of Debt—Liability of Owner of Part of Lands charged—Recovery of Arrears of Rent-charge—Abolition of Real Actions—3 & 4 Will. 4. c. 27. s. 36.

The defendant was the owner and occupier of a portion of certain lands in the parish of P., which by a private Act were charged with the payment to the vicar of an annual sum of 270l. in lieu of all tithes. The Act provided that if the annual rents were in arrear, the vicar was to have such and the same powers and remedies for recovering the same as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also that, if no sufficient distress was found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands:—Held, *that the vicar might maintain an action of debt against the defendant for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action of debt, having been abolished by* 3 & 4 *Will.* 4. *c.* 27. *s.* 36. Held further, *that the defendant had his remedy in an action against the co-owners for contribution.*

Thomas *v.* Silvester (42 Law J. Rep. Q.B. 237) *followed.*

Appeal by the defendant from a decision of the Divisional Court upon a Special Case stated by the Judge of the County Court of Yorkshire held at Pontefract.

The action was brought in the County Court to recover the sum of 14*s.* 8*d.*, being the amount of four years' arrears of certain corn-rents in lieu of tithes payable by the defendant to the plaintiff as Vicar of Pontefract.

The corn-rents were charged upon the lands of the defendant by an award of the commissioners under a private Act passed in 1797 (1), for the purposes, amongst other things, of dividing, allotting, and

(1) The Act of 1797 (37 Geo. 3. c. cxlvi.), after reciting that the Rev. Thomas Heron, as vicar of the parish of Pontefract, was entitled to certain vicarial tithes and Easter offerings arising or becoming due within that parish; that it would be a great benefit and advantage, not only to the vicar, but also to the inhabitants and parishioners and to the proprietors of houses and lands therein, if the vicarial tythes and Easter offerings were wholly extinguished and a proper compensation made for the same; and that a proposal, to which the vicar agreed, had been made that an annual sum of 270*l.*, free from all taxes and deductions whatsoever as well Parliamentary as parochial (subject to certain variations in the Act mentioned), should be assessed and raised in the manner directed in the Act, and should be paid to the vicar for the time being in lieu of and as full compensation for the vicarial or small tythes and tythes of every denomination whatever belonging to or which might be claimed as belonging to the vicar, and Easter offerings, further enacted, "that as soon as conveniently may be after the passing of this Act, the said commissioners shall, and they are hereby required to make a true and just valuation according to the best of their judgment of all houses, and of such lands," of a certain specified character, "situated in the parish of Pontefract, except lands and grounds proved to be exempt, and shall apportion, settle, ascertain, and assess the respective annual sum and sums of money which each and every owner and proprietor of such last-mentioned houses and lands or grounds shall or ought upon such valuation to be charged or chargeable with, for, and towards the raising and payment of the said annual sum of 270*l.*; and on making such last-mentioned valuation and assessment, the said commissioners are to consider the proportionate liability of such houses and lands to the payment of vicarial tythes and Easter offerings, and to assess and charge the same agreeable to such proportions, the said last-mentioned valuation being directed for no other purpose; and shall then lay an assessment by acre-tale on all the other lands and grounds within the said parish, except such lands and grounds for which exemptions shall be proved as aforesaid, in as fair a proportion as may be according to the judgment of such commissioners."

The Act also provided that the commissioners should, as soon as convenient after the passing thereof, enquire into the average price of good marketable wheat in the county of York during the fourteen years next preceding the passing of the Act, and by their award ascertain and set forth what quantity of wheat would be equal in value to the sum of 270*l.*, and should also declare what quantity

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

enclosing certain lands and grounds within the township of Pontefract, and of making

of wheat at that time was equivalent to the proportion of the annual sum of 270*l.* which each respective owner and proprietor of the lands and houses in the parish should by their award be assessed to pay; and also that there should be issuing and payable from time to time for ever thereafter to the vicar and his successors such respective yearly rents or sums of money (subject to variation in manner directed by the Act) out of the several houses and lands in the parish of Pontefract, in proportion to the assessment so to be made by the commissioners, as should be equal in value to the quantity of such wheat so to be ascertained and declared as last aforesaid, which said respective yearly rents or sums of money were to be in lieu of and full satisfaction and compensation for all vicarial or small tythes and tythes of every denomination whatever belonging to or which might be claimed to belong to the vicar and Easter offerings to be extinguished as aforesaid.

It was further enacted that the vicar or any of his successors by notice in writing might, upon certain specified conditions, after the expiration of seven years from the making of any award as in the preceding section mentioned, demand a re-assessment of the value of the corn-rents.

It was further enacted "that in case the said annual rents or sums of money so to be assessed and charged in lieu of vicarial tythes as aforesaid, or any of them or any part or parts thereof, shall be behind and unpaid after any of the said days or times hereinbefore appointed for the payment thereof respectively, then and in every such case it shall and may be lawful for the said Thomas Heron and his successors, vicars of the said parish, to have and exercise such and the same powers and remedies for recovering the same, together with the costs and charges thereby to be incurred of or upon the owners or occupiers of the houses, lands, grounds, and tenements, for which such annual sums or corn-rents are or ought to be paid and payable as aforesaid, as by the laws and statutes of this realm are provided and given for the recovery of rents in arrear; and if it shall happen that no sufficient distress shall be found upon the premises, then it shall be lawful to and for the said Thomas Heron and his successors to enter into and upon the messuages, cottages, lands, and tenements, subject to or charged with the payment of the annual sums or corn-rents which shall be so in arrear and unpaid, or into any part or parts thereof in the name of the whole, and to take and receive the rents and profits thereof to his or their own use, or to let the same, until thereby or therewith all the arrears of such annual sums or corn-rents as shall be so in arrear and unpaid, or that during such possession shall become due, and all costs and charges attending such entry

compensation for the vicarial tithes of the parish of Pontefract.

It appeared at the trial that the plaintiff was then, and during the whole of the four years in which the corn-rents were alleged by the plaintiff to have accrued had been, the vicar of the parish of Pontefract, and a successor of the Rev. Thomas Heron referred to in the preamble to the Act of 1797 (1); that the defendant was then, and during the above-mentioned period had been, the owner and occupier of a portion of a plot numbered on the award; that the amount of the corn-rent issuing from that plot was, as assessed by the commissioners, fixed at the sum of 3*s.* 8*d.* per annum; and that the power to re-assess the corn-rents had never been exercised.

It was further proved by the plaintiff that no payment had been made in respect of the corn-rent issuing during the period of four years from the plot in question; and it was admitted on both sides that the total annual value of the whole of the land constituting that plot in respect of which it was sought to recover the corn-rents exceeded the sum of 20*l.*

The County Court Judge gave judgment for the plaintiff, and also granted leave to the defendant to appeal by Special Case.

The Divisional Court (Williams, J., and Smith, J.) affirmed the decision of the County Court Judge.

The defendant appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Jeune*, for the appellant.—The question is whether the owner or occupier of a portion of a plot charged with the payment of the corn-rent can be sued in an action of debt, or whether the only remedy which the vicar has is by distress. The claim is made in respect of a sum charged upon the whole plot; and it is contended that the Act does not give an action of debt to the vicar so that he can sue the owner of a portion of a plot, however small it may be. The question turns on the meaning of the words of the

upon and perception of the rents and profits as aforesaid, and all damages incurred by reason of the non-payment thereof, shall be fully paid and satisfied."

section that the vicar is to have "such and the same remedies for the recovery o corn-rents in arrear as by the laws and statutes of this realm are provided and given for the recovery of rents in arrear." The only remedy when this Act was passed for the recovery of freehold rent in arrear was by real action. If it were not for the presence of the words recited the case would be concluded by the authority of *Willoughby* v. *Willoughby* (2), where it was held that an action of debt would not lie under the Act there in question. If no action will lie against the defendant, the only remedy which the vicar would have would be by distress; or, if that was not sufficient, by entry upon the lands until payment of the arrears had been satisfied. The words of this Act referred to above do not create any personal liability against the owner of a portion of a plot to pay the arrears of rent, and therefore do not give an action of debt. The land of which the defendant is owner of a portion only is no doubt liable, for there is a rent issuing out of that land. The Act under discussion does not give something more than a remedy by distress, for the only provision is that if the distress is not sufficient the vicar may then enter and take possession of the lands. Prior to this there is no mention of distress in the Act. Moreover, the only remedy given by law to a landlord, apart from contract, is the right to distrain; that right is created by the relation of landlord and tenant existing between the parties. An action of debt can only be maintained where the claim arises out of a contract. Under the writ of assize of novel disseisin, the land was held until the rent was paid; but although real actions were abolished by 3 & 4 Will. 4. c. 27. s. 36, that Act does not necessarily give an action of debt in every case in which the writ of assize of novel disseisin would have been available —*Thomas* v. *Silvester* (3). That case is a distinct authority that where before the Act of William a real action could be maintained, an action of debt will now lie. The only remedy given in express terms by the Act is by distress, together with the power to enter the land if there should not be sufficient distress. There was no necessity for an action to be brought, and the Legislature never intended to give a real action or writ of assize of novel disseisin. The Act did not contemplate giving an action of debt, but points out an ample remedy by distress and entry upon the land. The abolition of real actions must not be taken to have substituted a remedy by action of debt.

Bedford v. *Sutton Coldfield* (4), *Varley* v. *Leigh* (5), *Bacon's Abridg.* tit. "Remedies for Rent" (6), *Com. Dig.* tit. "Remedy for Rent" (7), *Gilbert on Rents* (8), and *Booth* v. *Smith* (9) were also referred to.

Forbes, Q.C., and *C. M. Atkinson*, for the plaintiff, were not called on.

BRETT, M.R.—The practical effect of the Act of 1797 is that there should be, instead of the vicarial tithes and Easter offerings, certain charges upon the lands in the parish in favour of the then existing and any subsequent vicar. In respect of the charges imposed by the Act certain remedies are given to the vicar. So far as the charges are concerned, the Act provides that the commissioners are to make a true and just valuation, according to the best of their judgment, of certain houses and lands in the parish, and to apportion and assess the sum of money which each owner and proprietor of such house or lands shall or ought, upon the valuation, to be charged or chargeable with towards the payment of an annual sum of 270*l.*; the commissioners also are to lay an assessment by acre-tale on all the other lands and grounds in the parish, subject, however, to certain exemptions. A charge in the nature of a freehold tithe rent-charge is thus imposed by the Act, which then goes on to say "that there shall be issuing, and payable from time to time for ever thereafter, to the said vicar and his

(2) 4 Q.B. Rep. 687, 705; 12 Law J. Rep. Q.B. 281.

(3) 42 Law J. Rep. Q.B. 237 Law Rep. 8 Q.B. 368.

(4) 3 Com. B. Rep. N.S. 449; 27 Law J. Rep. C.P. 105.

(5) 2 Exch. Rep. 446; 17 Law J. Rep. Exch. 289.

(6) See vol. 7, at p. 44 (7th ed.).

(7) See vol. 7, at p. 257, d. 1 (5th ed.).

(8) Pp. 100, 106,

(9) *Ante*, p. 425.

successors such respective yearly rents or sums of money out of the several and respective houses and lands within the said parish of Pontefract in proportion to the assessment so to be made by the said commissioners as aforesaid, . . . which said respective yearly rents or sums of money last mentioned shall be in lieu of and as full satisfaction and compensation for all the said vicarial or small tithes, . . . and shall be payable and paid to the said vicar and his successors in the vestry of the parish church of Pontefract aforesaid by two equal half-yearly payments in each year." A charge is therefore imposed upon each acre of land, and the whole amount is to be assessed upon those acres and upon their owners and proprietors, and payment is to be made to the vicar twice a year. That alone does not deal with the remedy to the vicar in case he is not paid; we must therefore go further, to see what is to be done in that case. It is then provided that in case the rents or charges in lieu of vicarial tithes are unpaid, the vicar of the parish is to have and exercise such and the same powers and remedies for recovering the same, together with the costs and charges thereby to be incurred of or upon the owners or occupiers of the houses, lands, grounds, and tenements for which such annual sums or corn-rents are or ought to be paid and payable as aforesaid, as by the laws and statutes of this realm are provided and given for the recovery of rents in arrear. Now, although the vicar is not a landlord, that enactment must surely mean that he is to have the same remedies in respect of the rent-charges upon the lands as if he were the landlord of those persons from whom the rents are due. It is then provided that if it shall happen that no sufficient distress shall be found on the premises—from which it is clear that one of the vicar's remedies is by distress—then it is lawful for the vicar to enter upon the lands which have been charged with the payment of the annual sums or corn-rents which shall be in arrear, or into any part or parts thereof in the name of the whole, and to take and receive the rents and profits thereof until all the arrears have been fully paid and satisfied. This Act was passed in 1797, and we must construe it as if it had to be construed on the day after it had been passed. Now what are the remedies which the vicar would have had for these arrears if he had then been the landlord of the persons from whom these payments were due, and if they had been rents—for he is to have the same remedies as a landlord would have had for the recovery of rent in arrear? When the Act was passed, one remedy which he would have undoubtedly had would have been by distress. If the rent was in arrear, he had another remedy by writ of assize of novel disseisin. Therefore, according to that, this Act, if construed at that time, would seem to give a remedy by distress, because a landlord has such a remedy for rent in arrear. For the same reason he had a writ of assize of novel disseisin, which was a real action. Some formalities would have to be gone through to enable a landlord to support such an action, and he would, amongst others, have to make a demand for the rent upon the land. This Act also, in addition to those remedies, gives another which a landlord had not got, for if there was not a sufficient distress upon the land, the vicar was empowered to take possession of the land and to receive the rents and profits until the payments should be satisfied. That was the case in 1797. Now, in 1883, there was a vicar of the parish in existence, and the defendant was the owner of a portion of the lands upon which the assessment was calculated in 1797. The vicar is entitled to receive a certain sum —14*s.* 8*d.*—in respect of the whole portion, and, having demanded payment from the defendant, has brought the present action. An objection was raised on behalf of the defendant that the vicar is not entitled to that remedy, for these reasons—first, that even if the defendant was the owner of the whole plot upon which the sum had been assessed, no action of debt would lie, because the only remedy given by the Act, except that of taking possession of the land if there was no sufficient distress found, was by distress. If that be true, it cannot be denied that no action of debt would lie. The defendant further says that no remedy by writ of assize of novel disseisin for non-payment of rent was given to the vicar at the time when that Act was passed; and that even if such a remedy

was given, it could no longer be put in force, for that form of action was abolished by 3 & 4 Will. 4. c. 27. s. 36; and therefore, even if the defendant was the owner of the whole plot, no action of debt would lie, because another remedy which was in existence when the Act was passed had been abolished. It was further contended that even if an action of debt would lie against the owner or occupier of the whole plot, it does not lie against the owner or occupier of part only of a plot. The Divisional Court held that although the defendant is owner of part only of the plot, and although at the time when the Act was passed an action of debt could not be maintained against him, yet now it does lie in respect of the assessment on the whole plot, even though he is the owner of a portion only. The question which we have now to consider is, whether we agree with the decision of the Divisional Court on the first point, as to whether this Act, at the time when it was passed, did give to the vicar the right to enforce his rights by a writ of assize of novel disseisin. I am of opinion that it did give the vicar that right, and that we cannot say otherwise unless we construe the words contrary to what is their ordinary meaning as applied to the subject-matter. The vicar would have had no remedy at all for these charges except that which was given by the statute. He requires this statute to give him a remedy even by distress, for a novel charge was imposed by it. But when it is said that the vicar is to have all the remedies which a landlord would have if these charges were rent, it would give him a right to enforce his remedy by a writ of assize of novel disseisin. I am dealing first with the case as if the defendant was the owner of the whole plot. The nature of the right of a landlord to whom rent was due at the time when the Act was passed seems to me to be that a certain sum of money was then due to him from a person who had to pay rent to him; and a fixed sum of money when it becomes due is by the common law a debt. But even if it be a debt, as the money was accruing from the occupation of land, the remedy given by the common law was a writ of assize of novel disseisin, and that was a real action. If the money was due not in respect of the occupation and use of the land, the proper proceeding for its recovery would have been an action of debt. There is a rule of the common law, that where a superior remedy is provided by a real action, the minor remedy of an action of debt cannot be exercised. But in order to shew that the money due was really a debt, it might be shewn that whilst the land was out of the possession of the landlord—that is, whilst the charge was existing—he could only sue by means of the writ of assize of novel disseisin, because that was the superior remedy. But the moment that remedy ceased to exist, he might sue for the rent in an action of debt.

The effect of 3 & 4 Will. 4. c. 27, which abolished the writ of assize, was to do away with the only process which at that time existed, and which was the superior remedy; but it did not do away with the debt. The necessary implication, therefore, is that the statute got rid of any difficulty which may have existed, and that when the superior remedy was no longer in existence, then the inferior one took effect. The necessary result of abolishing the superior remedy was that the inferior remedy was brought into exercise; and that seems to have been the view of Chief Baron Pollock in *Varley* v. *Leigh* (5), and was the real decision in *Thomas* v. *Silvester* (3), and I agree with the reasons upon which those decisions are founded. The remedy here given being such remedies as a landlord would have for the recovery of rent in arrear, the inferior remedy by action of debt could be applied to the corn-rents, and the owner would be liable to an action of debt. The rent-charge here was laid upon the whole plot of land, but although the defendant is the owner and occupier of part only, the vicar is entitled to payment in respect of the whole plot. It is obvious upon the hypothesis that the defendant is terre-tenant of part only of the plot, and that if the landlord had gone upon the land and claimed the rent in respect of the whole of the plot, this tenant would have been a disseisor, and the landlord would have been entitled to his writ of assize, under which the tenant would have been put out of possession of the land; for a

rent-charge cannot be apportioned, and in order to pay the rent-charge the whole of the land would be taken under the writ. If a distress had been put in, and the tenant's goods upon the land had been seized, then the distress would have been for the whole of the rent-charge. Again, if the distress was not sufficient, the whole of the land would have been seized, and held until the whole of the rent-charge had been paid. If that be so, and now that under 3 & 4 Will. 4. c. 21 an action of debt is maintainable, it seems to me to follow that the action lies against the defendant for the whole of the rent-charge. It was said that that would work an injustice, because he would be left to pay the debts of others; but that is not so, for I have no doubt that if he is compelled to pay the whole of the rent-charge he would have an action against the co-owners of the land for contribution. Wherever a man by process of law is compelled to pay what is due from another, he has a right of action over against that person. I am of opinion the decision of the Divisional Court was right, and the appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. The vicarial tithes in this case were arranged by the Act passed in 1797, the effect of which was to render certain portions of land, one part of which is occupied by the defendant, liable to the payment of the rent-charges. Without discussing the Act at length, I entirely agree with the reasons given by the Master of the Rolls for thinking that these rent-charges were issuing out of each of the parcels of land; and that they were of a similar character to ordinary rent-charges, and were capable of being enforced by the remedies and powers by which the law enables rent-charges issuing out of land to be enforced. The first question is whether an action of debt will lie against the defendant in respect of the arrears charged upon lands a portion only of which he occupies. Is there any difference by reason of the fact that he occupies a part only of the land? In the first place I think an action would lie against him if he had been in occupation of the entire parcel. The Act of 1797 confers upon the vicar "such and the same powers and remedies for the recovery of the corn-rents as by the laws and statutes of this realm are provided and given for the recovery of rents in arrear." At the date of the passing of that Act one of the remedies, amongst others, for the recovery of rent in arrear, over and above the remedy by distress, would have been a real action; the vicar would therefore have been entitled to his writ of assize of novel disseisin in respect of denial of payment on the part of the tenant after a demand of the rent-charge which was due had been made. That was a wrongful putting out of possession of the person who was seised of the freehold. Wherever a landlord was disseised—as, for instance, by the tenant enclosing the land so that the lord could not go upon it to distrain, or by hindering him from distraining when he had got upon the land: in these cases the landlord would have his writ of assize of novel disseisin to put him again into possession of what he had been dispossessed of. The reason for that being the only remedy was not because money was not due to him which under other circumstances he might have recovered in an action of debt, but because of the principle of law that where there is a superior remedy the party who seeks redress must resort to that remedy. It appears from *Fitzherbert's Natura Brevium* (10) that "the rule in the register is that when a man is disseised of a rent-charge or a rent-seck, it behoveth that all the tenants of the tenements charged be named in the writ of assize, and all the land be put in view, although he were disseised but by one tenant only." In an assize of novel disseisin, if the case of the demandant was made out, he was restored to the actual possession of the land until the rent was paid. The rule at common law is that an action of debt is merged in a higher remedy, but where the higher remedy is taken away the action of debt still remains. That was held in *Leving's Case* (11), which was referred to by Mr. Justice Blackburn in his judgment in *Thomas* v. *Silvester* (3), where he says, "Under the old law the remedy to re-

(10) Vol. ii. p. 178, 9th ed.

(11) Fitzherbert, Natura Brevium, 121 note (*d*).

cover a freehold rent was by real action, and as long as the freehold continued debt could not be maintained; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge." Applying that broad principle here, the effect of 3 & 4 Will. 4. c. 27, which abolished real actions, and amongst others the writ of assize of novel disseisin, is to destroy the higher remedy, but it leaves the remedy by action of debt. The authority for that is *Thomas* v. *Silvester* (3), which decides that what was said by Chief Baron Pollock in *Varley* v. *Leigh* (5) was just. An action of debt, therefore, will lie against the defendant if he were in possession of the whole parcel of land; but does it make any difference because he is in possession of a portion only? It is clear from the passage cited from *Fitzherbert*, that before the abolition of writs of assize of novel disseisin all the tenants of the tenements charged were to be named in the writ, and the whole of the land was to be put in view: if a person was aggrieved by the denial of the tenant of payment of the rent-charge, he had his remedy not only against that person, but also against the whole of the land out of which the rent issued. Does it make any difference that the remedy is now by an action of debt? As was pointed out by the Master of the Rolls, the remedy by distress operates against the whole of the land. It seems to me to follow that the remedy, as regards the debt, can be pursued against one of the occupants of a parcel to recover the entire rent-charge if before the statute he could have been compelled by a seizure of the land to pay the whole. The plaintiff is therefore entitled to recover.

FRY, L.J.—I am of the same opinion. The only observation I would make with regard to *Willoughby* v. *Willoughby* (2), which was pressed upon us as an authority, is that it does not appear to me to be inconsistent with the present decision. The Court there found an absence of any expression that the persons by whom the rents were to be paid were the persons against whom the remedies were to be directed; and upon that ground came to the conclusion that an action of debt would not lie against the defendant. But the words which were wanting there are present here; the reasoning in *Willoughby* v. *Willoughby* (2) does not therefore apply.

Appeal dismissed.

Solicifors—Emmet, Son & Stubbs, agents for Scholey, Wilson & Leatham, Pontefract, for plaintiff; John Cotton, agent for Wainwright & Mason, Wakefield, for defendant.

[IN THE COURT OF APPEAL.]

1884. Jan. 18. GIBBS AND OTHERS *v.* THE GREAT WESTERN RAILWAY COMPANY.*

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—*Negligence of Person having "charge or control of" points on a railway.*

The representatives of a workman on a railway who was killed by an accident caused by the negligence of a fellow-workman brought an action under 43 & 44 *Vict. c.* 42 *against the railway company for compensation. The evidence shewed that the fellow-workman acted under an inspector, that he did not control the points, that his duty was to oil and clean locking bars at twelve places, and that it was in doing this work that he left an obstruction on the line, which caused the death of the deceased workman:*—Held (*affirming the judgment of the Queen's Bench Division*), *that the defendants were not liable, for that there was no evidence to go to a jury that the workman whose negligence caused the accident was a person having "the charge or control of any signal, points, locomotive engine, or train upon a railway."*

Appeal by the plaintiffs from the judgment of the Queen's Bench Division making absolute a rule *nisi* obtained by the defendants to set aside a verdict for the plaintiffs and to enter a non-suit on the ground that

* *Coram* Lord Coleridge, C.J., Brett, M.R., and Bowen, L.J.

there was no evidence of liability on the defendants. An action was brought in the County Court, pursuant to the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), by the widow and children of George Gibbs, to recover compensation for personal injuries sustained by George Gibbs while in the employment of the defendants, which injuries resulted in death.

The question raised on the appeal was, whether there was evidence that a fellow-workman, named Fisher, was a person having the charge or control of certain points upon the railway of the defendants so as to render them liable under 43 & 44 Vict. c. 42. s. 1, sub-s. 5, for the injuries caused to Gibbs by Fisher's negligence.

The evidence relating to this question was as follows:—Fisher stated that he was employed by the defendants in the signal department, and had charge of the locking apparatus, that his duty was to clean, oil, and adjust the points and wires, to keep them oiled, and to see that a boy who worked under him did his work. On cross-examination he stated that he had several places to go to; that he worked under an inspector; that he was not a foreman, only a foreman of the cleaning with regard to the boy; that he did the cleaning, oiling, and adjusting with his own hand. Townsend, who was called by the defendants, stated that he was an assistant engineer on the railway; that Fisher's duty was to oil the points and lock lines, and to do anything else in connection with the signals; that he was little above a labourer, and had no charge or control over the points, and that they were worked from the signal-box. Saunders, an inspector, stated that Fisher was one of his men, that his duties were to oil and clean all the locking gear at twelve places on six or seven miles of the line, that he had a boy under him, that his wages were 24*s.* a week, and that he had no control over the points.

The jury in the County Court gave, in answer to questions left to them by the Judge, a verdict for the plaintiff for the amount claimed.

The defendants then obtained a rule to set the judgment aside, which was afterwards made absolute.

The plaintiffs appealed.

T. Wilkinson, for the appellants.

Webster, Q.C., and *W. W. Wood*, for the respondents, were not called on.

Lord Coleridge, C.J.—This case raises a question as to the evidence which was produced for the purpose of making the defendants liable in an action brought pursuant to 43 & 44 Vict. c. 42. s. 1, sub-s. 5, which enacts that where injury is caused to a workman "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway," the workman of his representatives may recover compensation from the employer.

The plaintiffs must make out that the person whose negligence caused the death of Gibbs had "the charge or control of" the points. Fisher undoubtedly did in fact cause this mischief; he was bound to oil certain machinery in a box connected with the points; he took off the cover of this box, put it on the line and left it there, so that a train which passed over the rails was upset, and Gibbs, the engine-driver, was killed. Does the evidence shew that Fisher had the charge or control of the signals or points? I think it does not. He had to do something to the points and to the machinery of the points; he worked under Saunders, and the evidence shewed, I think, that Saunders had the charge or control, but that Fisher had not. We must construe the statute according to the plain meaning of the words; and, as Mr. Justice Mathew said, there was in the County Court a mistake as to the nature of Fisher's duties. The judgment appealed from must be affirmed.

Brett, M.R.—The Judge in the County Court left two questions to the jury. He asked them whether Fisher had charge or control of the points, and whether his negligence caused Gibbs's death. The jury answered both in the affirmative. Now the statute in question has not made employers liable to their workmen for the negligence of all fellow-workmen. It is an Act passed in favour of workmen. I am prepared to construe it reasonably and largely in furtherance of the intention of Parliament; but the onus of proof is on

the plaintiff in cases such as the present, for a plaintiff must shew that the fellow-workman of the injured person was a fellow-workman for whose negligence the employer is by the Act made responsible. I think it is clear that Fisher had nothing to do with the signals, and that he had not control of the points. Had he then charge of the points? Now by the statute it is the person who has "the charge," that is, the general charge, of the points whose negligence will render the employer responsible for injuries caused to a fellow-workman by that negligence. The plaintiff in such a case is bound to shew what the duties of the person who has been negligent were, and then it is for the Court to say what the law is. The evidence given in the case shews, as it seems to me, that Fisher was little more than a labourer working under others, and that he was not a person who had the charge of those parts of the machinery of the line with regard to which he had to do certain work.

BOWEN, L.J.—I agree that this appeal must fail. I think that there is no evidence to shew that Fisher had the charge or control of the points. It is therefore impossible to say that the defendants are liable in this action.

Appeal dismissed.

Solicitors—Elgood, for plaintiffs; Nelson, for defendants.

[IN THE COURT OF APPEAL.]

1884. Jan. 29. 30. DYSON AND OTHERS (*appellants*) *v.* THE GREETLAND LOCAL BOARD (*respondents*).

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 216—*Parish divided into Two Districts—Part of Parish excluded from Urban District—Repair of Highways in excluded part—Amount of Rate assessed for.*

[For the report of the above case, see 53 Law J. Rep. M.C. 106.]

[IN THE COURT OF APPEAL.]

1884. May 22, 23, 30. THE QUEEN *v.* THE JUDGE OF THE COUNTY COURT AT CROYDON.*

County Court—Judge sitting in Bankruptcy—Jurisdiction to commit for Contempt—Non-obedience to Order to attend as Witness—Bankruptcy Act, 1869, *ss.* 66 *and* 96.

A County Court Judge sitting in bankruptcy has power under section 66 *of the Bankruptcy Act*, 1869, *to commit a person to prison for contempt for disobedience to an order made under section* 96 *directing him to attend before the Court and give information in respect of a bankrupt's estate.*

Appeal by A. W. Gibbons from a decision of the Divisional Court discharging a rule *nisi* for a prohibition.

An order had been made by the deputy Judge of the County Court at Croydon sitting in bankruptcy, under section 96 of the Bankruptcy Act, 1869 (1), directing

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

(1) By 32 & 33 Vict. c. 71. s. 66: "Every Judge of a local Court of Bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers as a County Court Judge, have all the powers and jurisdiction of a Judge of her Majesty's High Court of Chancery, and the orders of such Judge may be enforced accordingly in manner prescribed."

By section 96: "The Court may, on the application of the trustee at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination."

Although the Bankruptcy Act, 1869, is repealed by the Bankruptcy Act, 1883 (46 & 47 Vict.

Gibbons to attend before the Court and give evidence as to the estate of a bankrupt. Gibbons, although a reasonable sum had been tendered for expenses, failed to obey the order, and thereupon an order to commit him for contempt was made by the deputy Judge.

A Divisional Court (Grove, J., and Huddleston, B.) discharged a rule *nisi* for a prohibition against any proceedings being taken upon the order.

Gibbons appealed.

Charles, Q.C., and *Lynch*, for the appellant.—The Judge of the County Court held that Gibbons was in contempt in having failed to attend after being paid a reasonable sum for his expenses, and that he had contemptuously disregarded the subpœna and summons. It is clear that a County Court Judge cannot proceed against a person for contempt committed out of Court when he is exercising his ordinary jurisdiction, and the question raised here is whether the fact that he is exercising the jurisdiction in bankruptcy makes any difference in that respect—*Ex parte Jolliffe* v. *Lefroy* (2). By 32 & 33 Vict. c. 71. s. 65 the London Court of Bankruptcy is made a principal Court of record, and the Chief Judge has "all the powers, jurisdiction, and privileges possessed by any Judge" of the Superior Courts at Westminster or of the Court of Chancery. Section 66 (1) gives to every Judge of a local Court of Bankruptcy, such as this was, "all the powers and jurisdiction of a Judge" of the High Court of Chancery. In this case a summons was issued under section 96 (1) of the Bankruptcy Act, 1869, in form 76 of the forms of 1870. This contempt was not *in facie curiæ*, as it was in respect of process of the Court (3). Section 96 provides the Court with a remedy should the person summoned fail to attend. The Court of Chancery did not commit for contempt a person who failed to attend on a subpœna.

[FRY, L.J.—The Superior Courts of Westminster could commit for contempt, the Court of Chancery could do so, and does not section 66 give to a local Court of Bankruptcy all the powers of a Judge of the Court of Chancery?]

There is a marked difference between the phraseology of section 65 and section 66, and it would seem that it was not intended to give a local Court of Bankruptcy the same power as is given to the Chief Judge; nor indeed would it seem probable that it was intended to give to a County Court Judge sitting in bankruptcy this power which he has not when exercising his ordinary jurisdiction. Since the Judicature Act of 1873 a County Court can grant an injunction and can commit to prison for disobedience thereof—*The Queen* v. *Harrington* (4); but the Bankruptcy Act of 1869 does not give the power to commit in clear terms, and where the liberty of the subject is affected the language must be very clear and explicit to justify imprisonment.

J. Horne Payne, for the respondent.—The County Court Judge derives this power from section 66 of the Bankruptcy Act of 1869, the Act under which this summons was issued. That Act is repealed; and section 100 (1) of 46 & 47 Vict. c. 52, which replaces it, provides that a County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the

c. 52), s. 169, the sections above set out are practically re-enacted. Thus, by section 100, "A County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed." By section 27, sub-section 1, "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property." By sub-section 2, "If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may by warrant cause him to be apprehended and brought up for examination."

(2) 42 Law J. Rep. Q.B. 121; Law Rep. 8 Q.B. 134 (*nom. The Queen* v. *Lefroy*).

(3) 4 Black. Com. 283.

(4) 48 Law J. Rep. Q.B. 300, 677; Law Rep. 4 Q.B. D. 212, 491 (*nom. Martin* v. *Bannister*).

ordinary powers of the Court, have all the powers and jurisdiction of the High Court.

Section 71 of the Act of 1869 gave a right to a person committed to appeal against the order of commitment; and in *Ex parte Ferrige* (5) such an order was appealed against, and although that order was discharged on the ground of irregularity, no doubt was raised as to the power of the County Court Judge to commit.

[FRY, L.J.—Is there not a distinction between a summons, a subpœna, and an order?]

Section 96 calls it a summons, form 95 calls it a summons or subpœna; but the general term "order" perhaps describes it best. Unless section 66 does confer this power, a local Court of Bankruptcy has no power of enforcing any orders that it may make or any undertakings given by parties even *in facie curiæ*.

In re The Bank of Hindustan, Frickers' Case (6), *In re The English Joint Stock Bank* (7), *Buckley on the Companies Acts* (8), the Equity Jurisdiction Act, 1865, s. 1, and the Judicature Act, 1873, s. 89, were also referred to.

Lynch, in reply, cited *Wright* v. *Maude* (9), *The Queen* v. *Harrington* (4), 6 Geo. 4. c. 16. s. 34, and *Daniell's Chancery Practice* (10).

Cur adv. vult.

The following judgments were delivered on May 30:—

BRETT, M.R.—In this case the appellant was served with a summons to appear before a County Court Judge sitting in bankruptcy, and to produce certain documents, and to give evidence; he neglected to do so under such circumstances that when they were brought to the attention of the Judge he was induced to issue what was equivalent to an attachment, or order directing the appellant to be taken into custody and put into prison. The appellant obtained a rule *nisi* for a prohibition, which the Divisional Court discharged, and from that decision the present appeal is brought. The question raised is one of great importance, and if a County Court Judge has this power it is a very great power. The solution of the problem depends upon the statute under which the County Court Judge acted when sitting in bankruptcy. The first question is, what authority has he when sitting in bankruptcy? The Court of Bankruptcy is a Court of record, and the County Court Judge when sitting in bankruptcy is the Judge of a Court of record. It follows therefore, without any further enactment, that he would have certain powers to commit for contempt. He would have, by virtue alone that he is sitting as a Judge of a Court of record, power to commit for contempt in the face of the Court; but that which the appellant has done here does not appear to be contempt in the face of the Court, but consisted in not coming to the Court at all. If therefore the matter stood simply upon the fact of the Judge sitting in a Court of record I should think that he had not got the power which he assumed to have in this case. It was suggested that a County Court Judge sitting in bankruptcy is not only a Judge of a Court of record but also a Judge of a superior Court of record. I cannot accede to that. Both the Court of Bankruptcy and the Court of Chancery are superior Courts of record. If a County Court Judge be held to be a Judge of a superior Court of record as distinguished from a Court of record he would have all the powers which the Judges of the Court of Chancery and of the Courts at Westminster had; and by the mere fact of being such a Judge would have power to commit for contempt of any kind. The Court of Chancery has two different powers of committal for contempt: it has the ordinary power of a superior Court of record; but for the purpose of carrying out the process of the Court it has a procedure, where there is no real contempt of Court, by attachment for the mere fact of non-obedience to the process or for not carrying out that process. That follows

(5) 44 Law J. Rep. Bankr. 96; Law Rep. 20 Eq. 289.
(6) 41 Law J. Rep. Chanc. 278; Law Rep. 13 Eq. 178.
(7) Law Rep. 3 Eq. 203.
(8) pp. 267, 268.
(9) 10 Mee. & W. 527; 12 Law J. Rep. Exch. 22.
(10) 5th ed. p. 803.

from the effect of the decree alone, and not from the conduct of the party, for he may not be able to obey the decree. But the Court has other powers to commit for misconduct. If therefore this question stood only upon the ground of the assertion that the County Court Judge was sitting as a Judge of a superior Court of record I could not agree that he has any such power. I have great difficulty in supposing that the Legislature intended to give such a great power to County Court Judges, who, although entitled to the highest respect, might be sitting in remote parts of the country, and not subject to that control which is exercised over Judges of the Supreme Court who sit and act together, and not subject to the criticism of the bar of England. But the question is, whether the Bankruptcy Act, 1869, is so worded as to give them that power. That the Legislature would give a remedy to the County Court Judge I should have expected; but all that was absolutely necessary to ensure the proper distribution of assets was given by section 96. The appellant could certainly under that section have been brought up in custody to the County Court to give evidence; and if when he was before the Court he had refused to do so he would have been guilty of contempt in the face of the Court, and could have been committed to prison. It seems to me, therefore, that section 96 did give all the powers necessary for the purpose of conducting the business of the Court. But then there is section 66; and if the Legislature did give such powers, it is not for us to set ourselves against the enactment. The question now depends upon the ordinary modes of construing an Act of Parliament; and the Court cannot construe the section otherwise than according to the ordinary signification of the words as applied to the subject-matter. By section 66 a County Court Judge was given all the powers and jurisdiction of a Judge of the Court of Chancery; and that a Judge of the Court of Chancery had power in such a case as the present to commit is beyond doubt. This section therefore, if read in its ordinary sense, gave to the Judge of a local Court sitting in bankruptcy this extraordinary power, so that he may order such a person as the appellant to be taken into custody under section 96, and force him to give evidence; and even though the witness then answers, he also has a cumulative power, and may punish him by committing him to prison unless he apologises for his contempt in not having come at first. If the Legislature has given such a large power, we must decide accordingly. I was under the impression that section 66 might be read as meaning that the Judge was to have such powers for the purposes of this Act—that is, in order to advance the distribution of a bankrupt's estate; and if that were so he would have had the powers of the Court of Chancery as to making orders, and also as to enforcing them by attachment; but it would not have followed that he would have had power to commit for contempt which could be otherwise rectified. But upon consideration I have come to the conclusion that this section must be read in its ordinary sense as giving to every local Judge sitting in bankruptcy the extraordinary power to commit for contempt even though it is not committed in the face of the Court, and that it gave them the same powers as the Judges of the Court of Chancery, although they are not subject to the same criticism. If I thought there was no appeal to the Chief Judge in Bankruptcy I should have thought it impossible to say that the Legislature could have meant to give such a power; but being of opinion that an appeal is given I do not see the same difficulty. But it is not without considerable doubt that I have come to the conclusion that the County Court Judge had jurisdiction to make the order in question. The only question upon the application for the prohibition is, whether the Judge under any circumstances had power to make the order, and not whether the Judge in the present case rightly exercised that power. The appeal therefore fails, and must be dismissed.

BOWEN, L.J.—I am of the same opinion. I agree that the sole question is whether the County Court Judge had jurisdiction to punish the appellant for contempt of Court in not having obeyed an order or summons made under section 96. The power of a County Court Judge to commit to prison for a contempt which con-

sists in non-obedience to the process of the Court depends entirely upon the statute, and in particular upon section 66. Sections 65 and 66 respectively conferred jurisdiction upon the Judge of the London Court of Bankruptcy and upon County Court Judges throughout the kingdom. The authority of a County Court Judge is not so great as that of the Judge of the London Court of Bankruptcy under section 65; but by section 65 he is, for the purposes of the Act, to have "all the powers and jurisdiction of a Judge of Her Majesty's High Court of Chancery, and the orders of such Judge may be enforced accordingly in manner prescribed," and that means in the manner prescribed by the rules. The County Court Judge is only to have the powers and jurisdiction of a Judge of the Court of Chancery, whose powers, however, are ample, and include that of punishment by attachment for disobedience to an order. The question therefore is whether a County Court Judge is not, under section 66, clothed with the same power; and, if so, whether he can treat non-obedience to process issued under section 96 as contempt of Court. It is impossible in the face of the words of the statute to say that he has not power to enforce by attachment obedience to an order made when sitting in bankruptcy, provided that the case falls within this further limitation—namely, that the power is necessary for the purposes of the Act.

The provisions of various sections of the Bankruptcy Act—namely, sections 19, 28, 55, 56, 70, 73, 77, 93, and 126, in addition to those which have been referred to—have assumed that the Judges are to have power to punish for contempt of Court, and created what may be called certain statutory contempts of Court. The rules made under the Act take the same line; and rule 3 forbade the Judge to delegate to the Registrar the power which he had to commit for contempt. That is not conclusive, for the Judge may have had power to punish certain kinds of contempt of Court, but no others; but the fact is to be remarked that no distinction is made between the different kinds of contempt: nor is there any classification of contempts under the head of contempts punishable by the London Court of Bankruptcy and those punishable by a County Court Judge. Now, assuming that the Judge has power to commit for contempt, what is the position of the present appellant? He has been proceeded against under section 96, which has been substantially taken from section 115 of the Companies Act, 1862 (11). It seems to me that the summons or order was a process or order which, if it had been issued out of the High Court, could have been enforced by attachment. It was not a mere summons taken out in the course of the litigation, the result of which would have been that, if the person summoned did not attend, the case would proceed in his absence; but it was a summons to compel the attendance of a person whose evidence was absolutely necessary for the purposes of justice, and because the administration of justice could not proceed unless he were present. It was not therefore merely such a summons as would be taken out at chambers in an action, but a process served after special leave given by the Judge upon consideration; and that is as much a process of the Court as a subpœna in an ordinary action. If the disobedience was wilful, then the summons could be enforced by attachment, unless it could be shewn that some other remedy was provided for the purpose of enforcing this process. It was said that we ought to apply the well-known principle of construction, that where a sufficient and complete remedy is provided in the same statute for a statutory offence, it is not to be supposed the Legislature intended that remedies are to be sought elsewhere. But in order to apply that principle it is necessary to make out that the statute has provided a complete remedy; and that would not be the case unless the remedy mentioned was accumulative. It seems to me that the remedy provided by section 96 was not complete, and did not displace the other remedies given for contempt of Court. A witness might be brought up too late under section 96 for the purposes of examination; in any case by his non-attendance the expenses of litigation would be increased, and loss of time would be occasioned to the Judge and to the public. If the authority of the Judge could be defied, similar

(11) 25 & 26 Vict. c. 89.

orders made in other cases might become inoperative. Non-obedience to an order is a contempt of Court, not so much because the dignity of the Judge has been insulted, but because it interferes with the administration of justice. It is for that purpose, therefore, necessary that a Judge should have the power to punish for contempt of Court, otherwise he would not be provided with complete means of administering justice. The present decision does not rest simply upon reasoning, but upon the practice of the Court of Chancery, because under section 115 of the Companies Act, 1862, that Court can and ought to punish as contempt of Court wilful disobedience to one of its orders to attend. I therefore do not see why a similar construction should not be placed upon section 96 of the Act of 1869.

FRY, L.J.—I am of the same opinion. An order to attend was made upon the appellant under section 96 of the Bankruptcy Act, 1869. I say "an order" because, although the word used in the section is "summons," the summons issued is in effect an order by the Court to attend. It has been pointed out that an order so made differs from a summons, which may be taken out by one party requiring the other party to attend, or, if he does not, the case will proceed in his absence. An order under section 96 is made by the Court after judicial consideration of the necessity for making it, and is of a more solemn character than a subpœna, which is often taken out without such consideration. The summons issued under section 96 requires a judicial consideration of the Court as a condition precedent to its being issued. Section 66 of the same Act gave to the County Court Judge in bankruptcy, in addition to his ordinary powers as a County Court Judge, all the powers and jurisdiction of a Judge of the Court of Chancery, and the orders of such Judge are to be enforced "in manner prescribed." These latter words undoubtedly referred to rules to be made under the Act, but no such rules have been made prescribing the manner in which the orders of the Judge are to be enforced. The question now is, had the High Court of Chancery power, when the Act of 1869 came into operation, to commit a person who declined or refused to obey an order similar to that which has been made under section 96? It has been pointed out that at that time there was in force a provision under section 115 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which is practically identical with section 96. The question therefore is, whether the Court of Chancery had power in 1869 to commit a person to prison for disobedience to an order made under section 115 of the Act of 1862. I have no doubt that the Court had such a power. The only suggestion made as to that was, that section 115 of the Act of 1862, like section 96 of the Act of 1869, gave a particular power to arrest and bring before the Court a person who had disobeyed the order; but, for the reasons given by Lord Justice Bowen, it seems to me that the power did not exclude the power to commit for disobedience to the order. It was an equity power, and was in no case intended to take from the Court the general power which it had to enforce an order for contempt. A person might have been brought up at a subsequent time when his evidence would have been of no effect. I am confirmed in that conclusion by the observation that undoubtedly the Courts of common law had jurisdiction to commit for disobedience to a subpœna issued by a party; and if that be so, the Court of Chancery had the same power to commit with regard to disobedience to an order made by the Court after consideration as to the necessity for the attendance of a particular witness. While the County Court Judge was sitting in bankruptcy, it seems to me that he was sitting for the purposes of the Act; and the power to commit for contempt, when sitting in that character, is given for the purpose, not of vindicating the personal dignity of the Judge, but of carrying into effect without undue delay the duties cast upon him by the Act. I am confirmed in this conclusion as to the effect of section 66 by the other provisions of the Act of 1869. By section 19, and several other sections, it is declared that certain acts are to be deemed to be contempt of Court, and are to be punished accordingly; but the Act is silent as to the mode of punishment, unless it is to be found in section 66. It seems to me

that the Legislature intended to give the power to punish for contempt by committal. I am of opinion that the County Court Judge had power to commit the appellant for contempt, and this appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—J. C. F. Barfield, for appellant; Wynne-Baxter, Rance & Mead, agents for Streeter, Croydon, for respondent.

[IN THE COURT OF APPEAL.]

1884. May 14, 30. THE LONDON SCOTTISH BENEFIT SOCIETY *v.* CHORLEY AND OTHERS.*

Practice — Costs — Taxation — Solicitor acting in his own Cause—Right to Profit Costs.

A solicitor who successfully defends an action in person is entitled, upon taxation, to the same costs as if he had conducted the action as solicitor for some other person, and not merely to the costs to which a person, not a solicitor, suing or defending in person would be entitled: subject to this exception, that such costs are not to include items which the union of the two characters of solicitor and party renders impossible or unnecessary, such as instructions to or from himself or attendances upon himself.

Judgment of Divisional Court (*ante*, p. 272) *affirmed.*

Appeal by plaintiffs from a decision of the Divisional Court refusing to order a Master to review his taxation. The case is reported *ante*, p. 272.

The action was brought against the defendants, who were solicitors, to recover certain money which had been received by the defendants while acting as the plaintiffs' solicitors. The action was referred to a barrister, who made his award in favour of the defendants, and directed the plaintiffs to pay the costs of the reference. The defendants conducted their own defence. The plaintiffs, on the taxation of costs, objected that the defendants were only entitled to costs out of pocket, or such costs only as they would have been entitled to if they had not been professional men. The Master overruled the objection, and allowed costs as between party and party, with the exception of certain charges for instructions.

The Divisional Court (Denman, J., Manisty, J., and Williams, J.) upheld the decision of the Master.

The plaintiffs appealed.

Cock, for the plaintiffs.

Tindal Atkinson, for the defendants.

The arguments were substantially the same as in the Court below.

Coke's Instit. (1), *Sayers on Costs* (2), *Hullock on Costs* (3), *Beames's Doctrine of Costs* (4), *Lush's Practice* (5), *Chitty's Archbold's Practice* (6), *Pulling on the Law of Attorneys* (7), *Cordery's Law of Solicitors* (8), *Gordon on Costs* (9), *Jervis* v. *Dewes* (10), *Parsloe* v. *Foy* (11), *Leaver* v. *Whalley* (12), *Sclater* v. *Cottam* (13), *Price* v. *McBeth* (14), *Ex parte Chamberlayne; in re West* (15), 2 *Bacon's Abridg.* (16), Order LXV. rule 8 and Appendix N, were referred to.

Cur. adv. vult.

The following judgments were delivered on the 30th of May:—

BRETT, M.R.—In this case an action was brought against a firm of solicitors, who defended it in person, and having obtained judgment in their favour were entitled to costs. Upon taxation the defendants claimed to have certain items in their bill of costs taxed as if they had been

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

(1) 2 Instit. 288. tit. "Gloucester," cap. 1 (10 & 11) (ed. 1817).
(2) At p. 5 (1768).
(3) At p. 3 (1810).
(4) *passim* (ed. 1822).
(5) At p. 775 (ed. 1840).
(6) 12th ed. at p. 80.
(7) 3rd ed. at p. 267.
(8) At p. 120.
(9) See pp. 187, 195.
(10) 4 Dowl. 764.
(11) 2 Dowl. 181.
(12) 2 Dowl. 80.
(13) 3 Jur. N.S. 630.
(14) 33 Law J. Rep. Chanc. 460.
(15) 14 Jur. 997.
(16) At p. 332.

acting as solicitors for another person, although they had appeared in person; and the question is whether that contention can be maintained. It was urged that there is no difference upon taxation between a solicitor and any other party, whether plaintiff or defendant, who appears in person; but on behalf of the solicitors it was urged that they were entitled to have their costs taxed in the same way as if they had been acting as solicitors for a client. In my opinion neither contention is absolutely accurate.

The costs of a solicitor who appears in person must be taxed in a different way to those of other litigants who appear in person. I do not agree that the costs of a solicitor who acts on his own behalf are to be taxed precisely as if he were acting as solicitor for another person. If this were the case of the privilege of solicitors as distinguished from other persons, I should, unless bound by authority, be wholly unable to agree with the proposition; but I do not think the difficulty arises in that way. The law is, that if a person is forced into litigation and is successful, the person who has wrongly forced the litigation upon him ought to indemnify him, so far as the law can allow, for the pecuniary loss which he has incurred by reason of that litigation. Taking the case of a person who is not a solicitor, his opponent ought to indemnify him for the pecuniary loss caused by the litigation, so far as the law can allow; but it has always been difficult to say how far the costs have been caused by the party's own over-anxiety, or by the necessary conduct of his opponent. That difficulty is the cause of the great difference in amount which exists between costs when taxed as between party and party and as between solicitor and client. But when a party who is not a solicitor appears in person, the law never has assumed to indemnify him for personal loss of time; it is for a pecuniary loss which he has suffered. Therefore where a person appears by a solicitor, it being reasonable that he should do so, such costs as have been reasonably expended in employing the solicitor will be allowed. But a party who appears in person merely loses his own time and puts himself to trouble and inconvenience; and this is not a pecuniary loss of which the law takes cognisance; he can only recover costs out of pocket, because although he only appears in person he cannot personally do everything in the Courts, and although his appearance on the record is in person, he employs a solicitor to do certain parts of the procedure, and so is money out of pocket. If he chooses to conduct his own case he has certain fees to pay, and that is money out of pocket; the law therefore has said that whatever is paid out of pocket is pecuniary loss occasioned by the litigation; but that loss of time, trouble, and annoyance are not a loss for which he is to be indemnified. A solicitor who sues or defends in person is able by reason of his position to do certain things for himself: he would be entitled to employ another solicitor, but as there could be no possible reason for forcing him to do so, the law allows him to do the work himself. But in that case the solicitor will be out of pocket, and that is a loss which the law can recognise and estimate. A solicitor who by his clerks does that which, if he did not do it himself, he would be forced to employ another solicitor to do, suffers not loss of time but loss of money; and to force him to employ another solicitor would be mere circuity. Therefore when a solicitor sues or defends in person there are items which, although in one sense they might be said not to be money out of pocket, yet are substantially the same as costs out of pocket in the case of another litigant who appears in person. It is therefore true to say that the costs of a solicitor who appears in person must be taxed differently from the costs of other litigants. But he cannot charge for things which do not in fact exist. Thus he cannot make a charge for instructing himself to bring or defend an action, nor for consulting himself, because he can neither instruct nor consult himself; neither can he attend upon himself. This seems to me to be the rule, that when a solicitor brings or defends an action in person he is entitled upon taxation to the same costs as if he had not been a party: subject, however, to this, that such costs are not to include any items which the union of the two characters of solicitor and party renders impossible or unnecessary, such as attendances upon himself and instructions

to or from himself; but in any case in which the attendance is capable of being attributed to either of the characters of party or solicitor, as, for example, attendance at the trial, then no costs are to be allowed. Then are we entitled to lay down this rule? I do not see that any rule to the contrary has ever been laid down. Has there been an inveterate practice the other way? I should hardly feel myself bound by the practice of the Masters, even if there had been such a practice; but it has been shewn that the practice is not uniform, and that a rule similar to that which I have stated has in some cases been followed. There is no authority or practice against that rule, which seems to be the only sensible one for the taxation of such costs as are now in question.

The taxation, however, in this particular case is not accurate. The bill of costs must therefore go back to the Master, in order that he may review it and see whether any items have been allowed which ought not to have been allowed according to the rule which I have stated. What the effect of that review will be we cannot at present say; that will be a matter to be considered when we know the result. The question as to the costs of this appeal will therefore be reserved.

BOWEN, L.J.—I am of the same opinion, and I agree not only with the decision, but also with the reasons for it which have been given by the Master of the Rolls. The principle which underlies the whole of this subject is that the Courts are open to every person. A person cannot complain, even if at a cost of a great deal of trouble and anxiety to himself another person chooses to assert his civil rights; but a protection against abuse which was created by statute was that the costs of the successful litigant are to be borne by the unsuccessful litigant. The Statute of Gloucester (17), with a view to satisfy to a certain extent the successful demandant for the expenses of a litigation which he had been forced into by the obstinacy of an adversary, gave him the costs of his writ. There is a passage in the second part of *Coke's Institutes* which affords a key to the view which has been taken of costs subsequently and to that which we are taking with regard to these costs. He says (1), "*costage de son briefe purchase.* Here is expresse mention made but of the costs of his writ; but it extendeth to all the legall costs of the suit, but not to the costs and expences of his travell and losse of time; and therefore *costages* commeth of the verb *conster*, and that againe of the verb *constare*, for these *costages* must *constare* to the Court to be legall costs and expences." Coke in this passage means that the Courts only allow to the successful litigant such costs as are legal costs, and are the exact and necessary result of the litigation, and which can be measured by the Court. Such costs must have been directly caused by the litigation. Professional skill and labour are recognised by the law as the immediate and necessary result of the litigation, wherever such labour and skill are bestowed. But the private expenditure of time and labour which is not professional is not a matter which the law can measure, nor one which is immediately caused by the litigation. It is not dependent upon the necessities of litigation alone, but upon the individual industry, zeal, or nervousness of the litigant. The law does not measure that, or consider it as directly caused by the litigation. Such expenditure of time and labour is outside the costs of the litigation, and is not covered by the indemnity given by the statute. But professional skill and labour are not the less skill and labour because they are bestowed by the litigant himself; he would be allowed costs if he employed another solicitor, not because they would be costs out of pocket, but because they would be expenses incurred in respect of items which the law says are capable of being measured. I know of no rule to the effect that costs are to be allowed if the work is done through another solicitor, but are to be disallowed if it is done for the litigant by his own clerks. I agree with the Master of the Rolls that this is not a question of solicitors' privilege, nor whether there is a difference between solicitors and other persons. My judgment rests upon this—

(17) 6 Edw. 1. c. 1.

that although there is no ground for saying there is any difference between solicitors and others for the indulgence of the Court, there is a difference in respect to their work and labour; and, in considering what are legal charges, there must be included in such charges the skill and labour of professional but not of private persons. The practice has not been uniform, and in Chancery has not been exactly the same as at common law. There is some corroboration of the view we take, for it is laid down in *Lush's Practice*, that "a party not an attorney, suing or defending in person, is entitled to no more than his expenses out of pocket, or at most to a reasonable amount beyond for loss of time; but an attorney regularly qualified is allowed to make the same charges for business done when he sues or defends in person as when he acts as attorney for another." I think that that must mean in substance what has been said by the Master of the Rolls in his judgment, with which I entirely agree.

FRY, L.J.—I am of the same opinion. I consider that this is in no sense a question of the privilege of solicitors. The question is to be determined by the rules of law as to costs. The conclusion at which we have arrived is beneficial to the non-professional public. If it were laid down as a rule that a solicitor who is a party is in no case to receive costs, he would in all cases employ another solicitor to conduct the litigation, and the unsuccessful litigant would have to pay full costs. The law as we have laid it down will enable a solicitor to conduct his own case, and the unsuccessful party will have to pay something less than if another solicitor had been employed.

Appeal dismissed.

Solicitors—Harries, Wilkinson & Raikes, for plaintiffs; defendants in person.

BANKRUPTCY. 1884. March 31. } *In re* JORDAN; *ex parte* HARRISON.

Bankruptcy — Practice — Bankruptcy Rules, 1883, *rules* 65–69—*Rules* 1870, *rules* 78–81—*Equitable Mortgagee, Application by, for Sale—Conduct of Sale—Costs of Trustee—Discretion of Court.*

Where an equitable mortgagee of property of a liquidating debtor applies to the Court for an order for sale, it is wholly in the discretion of the Court to whom the conduct of such sale is given. If the security be insufficient to satisfy the mortgage debt, the conduct of the sale will properly be given to the mortgagee; otherwise to the trustee. The Court has also discretion as to allowing the trustee his costs occasioned by such application. In all cases where the trustee properly incurs expense in relation to such application or sale, the same when sanctioned by the Court will be constituted a first charge on the proceeds of the sale.

This was an appeal against the order of the County Court Judge, dated the 20th of February, 1884, by the trustee of one Jordan, who had filed his petition in the County Court of Staffordshire on the 29th of September, 1883. On the 17th of October, 1883, resolutions for liquidation were duly passed, and the trustee with a committee of inspection appointed.

At the date of the filing of the petition Lloyd's Banking Company, creditors of Jordan, were equitable mortgagees, having had deposited with them, as security for 2,300*l.*, the title-deeds of a leasehold brickyard. Such security was insufficient to cover the charge.

The order of the County Court Judge on the application of the bank was that the property in question should be sold at such times and in such manner as the bank should think fit, and that the bank should have the conduct of the sale, preparing the particulars, conditions, and contract of sale, which should, however, be approved by the Registrar of the Court. The notice of the sale was to be published in certain papers; the trustee was to join in the conveyances to the purchasers, and the Registrar was to settle the drafts in case

of dispute. The proceeds of the sale were to be applied, first, to defray the costs and charges of the bank in reference to the security, including their application to the Court, and then in satisfaction of the money owing to the bank on the security. The surplus (if any) to be paid to the trustee. Lastly, the trustee was ordered within seven days after service of the order to deliver up on oath to the bank all deeds and documents in his possession, custody, or power relating to the security and the premises comprised therein.

Cooper Willis, Q.C., and *C. Gould*, for the trustee.—The first objection is that the trustee is deprived of the conduct of the sale; and also that there is no provision for his costs. No misconduct on his part is suggested; and, that being so, he is entitled to his costs as a first charge on the proceeds of the sale; and the practice is always to allow him, as an impartial person, to have the conduct of the sale. Rules 78, 79, and 80 of the rules under the 1869 Act are re-enacted in rules 65, 66, and 67 of the 1883 Act. They are imperative, and have been disregarded in this order. Again, the Court ought to limit some time and place for the sale, and not allow the mortgagees uncontrolled discretion. The part of the order requiring delivery up of the documents by the trustee cannot be supported. An inspection could be ordered, and would not be resisted.

Yate Lee, contra.—The order as to the conduct of the sale was right, because this is an insufficient security; the Court has a discretion, and would not in such case throw upon the mortgagees the costs of the trustee in conducting the sale. The bank will, of course, pay the trustee his costs where they require him to act or concur in any matter or to make affidavits. For the rest the Court will be guided by the procedure in Chancery, where a mortgagor never gets costs when the equitable mortgagee applies to the Court to realise the security. The Court of Bankruptcy has all the powers and jurisdiction of the Court of Chancery (sections 65 and 66, Bankruptcy Act, 1869), and therefore will act in accordance with 15 & 16 Vict. c. 86. s. 48, and follow the practice of the Court of Chancery. The equitable mortgagee might apply either to the Court of Chancery or of Bankruptcy—*Ex parte Anderson* (1) and *Ex parte The Sheriff of Middlesex; in re Buck* (2). The rule as to costs should be the same in either Court.

Willis, Q.C., in reply, cited *Ex parte Hirst; in re Wherly* (3).

CAVE, J.—I do not think that I ought to adopt Mr. Yate Lee's ingenious argument, and look at the procedure and practice in Chancery so as to determine what order I should make in Bankruptcy. This is in the Court of Bankruptcy, to which the respondents applied, as they had a right to apply; and I am of opinion that the order which they asked for can be made, and only properly made, under rules 78 to 81, which specifically provide for such matters.

The chief contention before me has been that the trustee is entitled by those rules to have an order directing his costs of the application to the Court and of attending the sale made a first charge on the proceeds of the sale. It is also said that the Court has no discretion in respect of the costs of the application, rule 80 being imperative. I do not however think that that rule was intended to take away all discretion from the Court in dealing with the costs of the application. It would, in my opinion, work most injuriously to fetter the discretion of the Court, and compel it to give the trustee his costs.

It would or might lead to unnecessarily long affidavits being made, and other expenses being incurred, were it known that the trustee must be allowed his costs of the application under all circumstances. I think that rule 80 leaves to the Court the discretion which it has over the costs of all applications made to it. The rule does this: it provides that if the Court be of opinion that the trustee should have his costs of applying, then such costs must be made a first charge

(1) 39 Law J. Rep. Bankr. 49 Law Rep. 5 Chanc. 473.

(2) 48 Law J. Rep. Bankr. 33; Law Rep. 10 Ch. D. 575.

(3) Law Rep. 11 Ch. D. 278

on the proceeds of the sale. Another point is in respect of the costs of attending the sale; and here again, in ordinary cases, the rule contemplates that the trustee will have the conduct of the sale, and, if so, that he will necessarily incur expenses, and that such expenses must also be made a first charge on the proceeds. But it may well be that, especially where there is no prospect of any surplus, the Court may think that it is proper that the trustee should not have the conduct of the sale. In such case there is discretion to order accordingly. The mortgagee's interest is to obtain the most he can by the sale, when the security is insufficient, and that is a good reason for giving him the conduct of the sale. Where a surplus is likely to be realised, the trustee would be the proper person, because he would have an interest in obtaining such surplus which the mortgagee would not have. If, then, the trustee has not the conduct of the sale, then the Court can protect him, in case of there being anything which may necessitate his interference and properly cause him to incur expense, by giving him, as has been done here, "liberty to apply."

Applying these general principles to the case before me, I will now deal with the objections *seriatim* as to the sale. The trustee asks the Court to fix a limit of time, and refers me to rule 78. It seems to me that the order as made does give the bank an absolute discretion as to when, where, and by whom the property is to be sold; but I do not think such order inconsistent with the rule. The Court requires notice to be given by advertisement, but does not itself fix time, place, or conditions. I will, however, add the words, "ten days' notice of the time and place of sale to be given to the trustee."

Next, as to the conduct of the sale. The objection to this part of the order I have really already dealt with. I think, however, that it may be added that copies of the particulars and conditions shall be sent to the trustee ten days before the sale. He can then apply under the liberty reserved, should he think there is anything wrong in them. The order directs the trustee to join in the conveyance, and he now says that he will not object, provided his costs are paid. I shall therefore add, "Harrison's costs of joining to be paid as hereinafter directed"; and I shall then make an insertion which will cause the order to run thus: "The money arising from such sale shall be applied in the first instance in payment of the costs of the trustee herein directed to be paid, such costs to be taxed by the Registrar; and, in the second place, in payment of the costs, charges, and expenses of the company."

Next, as to the documents: the order will be that the trustee "shall, within five days from the date of the said order, make, if required, an affidavit of the documents and writings in his possession, custody, or power relating to the said security and the premises contained therein, the trustee's costs of such affidavit to be paid as hereinbefore directed." The affidavit will only be made if the bank require it.

As to the costs of the application in the Court below, I shall not interfere with the discretion exercised by the Judge.

As to the costs of this appeal, substantially the respondents have succeeded, and must have their costs; but the trustee will be allowed to take them out of the estate. In a future case a trustee failing in an appeal will probably have to pay his own costs; but as the point is new, I do not think it right to settle the practice at the expense of this particular trustee, and it seems therefore to me a proper case for the costs to come out of the estate.

Order varied accordingly.

Solicitors—Geare, Son & Pease, agents for J. & W. J. Drewry, Burton-on-Trent, for trustee; Tucker & Lake, agents for Wragge & Evans, Birmingham, for the Bank.

1883. Nov. 30. } CARTER v. DRYSDALE AND OTHERS.

Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *s.* 7—*Notice of Injury—Omission of Date—"Defect or Inaccuracy"—Defendant not prejudiced.*

The omission of the date of the accident from a notice of injury under the Employers' Liability Act is a "defect or inaccuracy" within the meaning of section 7 of the Act, and the notice is not invalidated thereby unless the defendant is prejudiced in his defence and there was an intention to mislead.

Appeal by motion from the decision of the Judge of the Whitechapel County Court in an action under the Employers' Liability Act, 1880.

The notice of injury given by the plaintiff under section 4 did not state the date of the injury as required by section 7. The notice was sent by post to the defendants by the plaintiff's solicitor, and with it was sent a letter from the solicitor to the defendants which stated the date of the injury. The notice did not refer to the letter. The County Court Judge was of opinion that the defendants were not prejudiced in their defence by the omission of the date, and that it was not done for the purpose of misleading; but he held the notice insufficient, on the authority of *Keen* v. *The Millwall Dock Company* (1).

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4, provides that "an action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death."

By section 7 it is provided that "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there be more than one employer, upon one of such employers.

"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

R. B. Muir, for the defendants, shewed cause.—Section 7 is imperative, and the proviso at the end does not absolve the plaintiff from the necessity of stating the date of the accident in his notice, although the defendant is not misled or prejudiced. He relied on *Keen* v. *The Millwall Dock Company* (1).

A. P. Poley, for the plaintiff, was not called upon.

LORD COLERIDGE, C.J.—In *Keen* v. *The Millwall Dock Company* (1) all the Judges were of opinion that, whether or not the notice of injury could refer to another document, section 7 must be complied with. I am of opinion that the saving words at the end of section 7 are wide enough to cover this case. The omission to state the date of the injury was a "defect" in the notice. As, however, a letter giving the date accompanied the notice, the defendant was not prejudiced by the omission. The County Court Judge has found this as a fact in the terms of the statute, and I therefore think that he was wrong in deciding that the action was not maintainable.

MATHEW, J.—I am of the same opinion. If the contention of the defendants were right, section 7 would be a snare for the unwary.

Decision reversed.

Solicitors—J. Davis, for plaintiff; Le Riche & Son, agents for Payne & Galloway, Manchester, for defendants.

(1) 51 Law J. Rep. Q.B. 277; Law Rep. 8 Q.B. D. 482.

1883. Nov. 5. BRADBURY v. COOPER.

Practice—Particulars—Slander—Names of Publishees—Slander by Agent.

In an action of slander in which publication by a third person, at the request and by the direction of the defendant, is alleged, particulars of the names of the alleged publishers may be ordered.

Appeal from Day, J., at chambers affirming the order of the Master that the plaintiff give particulars to the defendant of the persons to whom certain slanders alleged in the statement of claim were published.

The statement of claim alleged that on certain dates "one C. Timson, at the request and by the direction of the defendant," published certain slanders of the plaintiff, and that on certain other dates "the said C. Timson, at the request and by the direction of the defendant," published certain other slanders of the plaintiff "to a certain customer of the plaintiff."

J. W. Jones, for the plaintiff, relied on *Eade* v. *Jacobs* (1). The order would make the plaintiff shew the defendant his brief and give him the names of his witnesses. He also cited *Benbow* v. *Low* (2) and *The Attorney-General* v. *Gaskill* (3).

Houghton, for the defendant.—The defendant ought to be allowed to have this information, as without it he cannot identify the occasions referred to. These particulars are commonly allowed.

GROVE, J.—I am not satisfied that the practice is to order particulars of the names of publishees in actions of slander. I give no opinion on the question whether particulars ought to be allowed when the defendant is alleged to have uttered them himself; but this is a peculiar case. The defendant is alleged to have uttered the slanders through an agent, and the defendant may well ask to know to whom the slanders were uttered, in order that he may not be unprepared to meet his adversary's case at the trial. I therefore think that the order appealed from must be affirmed.

SMITH, J.—I am of the same opinion. Considering the peculiar circumstances under which these slanders were alleged to have been uttered, I think the defendant is entitled to the particulars for which he asks, to enable him fairly to meet the plaintiff's case at the trial, especially as one of the slanders is alleged to have been uttered nearly two years ago. I do not think that particulars should be given, for example, of the persons who were passing in the street at the time. In *Eade* v. *Jacobs* (1) Lord Justice Cotton said: "Looking to the Chancery practice, I hold that the person interrogating has a right to get at a statement of the facts relied on by the other party as establishing his case, but he is not entitled to obtain the evidence of those facts." It seems to me that the particulars ordered in this case are particulars of facts relied on by the other party as establishing his case, and not the evidence of those facts.

Appeal dismissed.

(1) 47 Law J. Rep. Exch. 74; Law Rep. 3 Ex. D. 335.
(2) 50 Law J. Rep. Chanc. 35; Law Rep. 13 Ch. D. 553.
(3) 51 Law J. Rep. Chanc. 870; Law Rep. 20 Ch. D. 519.

Solicitors—S. B. Somerville, agent for T. Phillips, Llandovery, for plaintiff; A. R. Chamberlayne, agent for Bullock & Penny, Berkhampstead, for defendant.

[IN THE COURT OF APPEAL.]

1884. June 20. THE QUEEN v. EDWARDS (*Justice*) AND THE EASTERN AND MIDLAND RAILWAY COMPANY.

Lands and Railways Clauses Acts—Jervis's Act—Compensation not exceeding 50*l.*—"*Settlement by Two Justices*"—"*Order*"—"*Damages directed to be paid*"—8 *Vict. c.* 18. *ss.* 22 *and* 24—8 *Vict. c.* 20. *ss.* 6, 16, *and* 140—11 *&* 12 *Vict. c.* 43. *s.* 11.

[For the report of the above case, see 53 Law J. Rep. M.C. 149.]

[IN THE COURT OF APPEAL.]

1884. July 1, 3. Aug. 8. } SANDERSON *v.* THE MAYOR ETC. OF BERWICK-UPON-TWEED.*

Landlord and Tenant—Breach of Covenant for Quiet Enjoyment.

A general system of drainage, consisting of lines of underground drains fed by transverse lines of field drains, was formed over an enclosed district which embraced certain farms of the defendants. Among these farms were a farm let to the plaintiff, and a farm lying above and adjoining it. In 1865 *the upper farm was demised to C, the demise including "waters and water courses," with a right to use the drains through the plaintiff's land, for the purpose of carrying away from C's land so much water as they were adequate to carry. Subsequently the lower farm was demised to the plaintiff, the lease containing the usual covenant for quiet enjoyment without interruption by the lessors or any person lawfully claiming through or under them. By an excessive user on his farm by C of the drainage system which was properly constructed, the plaintiff's land at O was injured. The plaintiff's land at Q was also injured by the proper user by C of drains passing through the plaintiff's land which were improperly constructed:*—Held, *that the defendants were in no way liable to the plaintiff for the damage done at O, but that it was otherwise with respect to the damage done at Q, there having been a substantial interruption by C, a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, so as to constitute a breach of the covenant for quiet enjoyment.*

Appeal of the defendants from the judgment of Denman, J., after trial at Newcastle-upon-Tyne.

The facts are sufficiently stated in the judgment of the Court.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *T. W. Chitty* (*Lockwood, Q.C.*, with them), for the appellants.

A. Wills, Q.C., and *G. Bruce, Q.C.*, for the respondent.

* *Coram* Brett, M.R., Bowen, L.J., and Fry L.J.

The following authorities were referred to:—*Alston* v. *Grant* (1), *Rylands* v. *Fletcher* (2), *Pyer* v. *Carter* (3), *Suffield* v. *Brown* (4), *Watts* v. *Kelson* (5), *Wheeldon* v. *Burrows* (6), *Richards* v. *Rose* (7), *Ewart* v. *Cochrane* (8), *The Queen* v. *Pedley* (9), *Anderson* v. *Oppenheimer* (10), *Bell* v. *Twentyman* (11), *Todd* v. *Flight* (12), *Lord Egremont* v. *Pulman* (13), and *Dennett* v. *Atherton* (14).

Cur. adv. vult.

The following judgment of the Court was delivered (on August 8) by

FRY, L.J.—In this case there has been some difficulty in ascertaining the facts necessary for the determination of the questions raised; but we think that, from the statements of counsel and the findings of the referee, the following narrative may be taken as the basis for decision. In the year 1845, a moorland district within the borough of Berwick was enclosed, and a system of drainage formed, the general scheme of which consisted in the construction of long lines of underground drains, converging as they passed from the higher to the lower ground, which were fed by transverse and nearly parallel lines of field drains. There appears to have been one general scheme, which embraced several farms belonging to the defendants, including the plaintiff's farm and a farm lying above the plaintiff's farm and adjoining it. Three of the long lines of

(1) 3 E. & B. 128; 23 Law J. Rep. Q.B. 163.
(2) 33 Law J. Rep. Exch. 161; Law Rep. 3 H.L. 330.
(3) 1 Hurl. & N. 916; 26 Law J. Rep. Exch. 258.
(4) 33 Law J. Rep. Chanc. 249.
(5) 40 Law J. Rep. Chanc. 126; Law Rep. 6 Chanc. 166.
(6) 48 Law J. Rep. Chanc. 853; Law Rep. 12 Ch. D. 31.
(7) 9 Exch. Rep. 218; 23 Law J. Rep. Exch. 3.
(8) 4 Macq. 117.
(9) 1 Ad. & E. 822.
(10) 49 Law J. Rep. Q.B. 708; Law Rep. 5 Q.B. D. 602.
(11) 1 Q.B. Rep. 766.
(12) 9 Com. B. Rep. N.S. 377; 30 Law J. Rep. C.P. 21.
(13) Moo. & Malkin, 404.
(14) 41 Law J. Rep. Q.B. 165; Law Rep. 7 Q.B. 326, 327.

drains coming from the land above the plaintiff's farm met first inside the upper boundary of that farm in a field marked O on the map which has been used in this case, and from thence the water was carried in a large drain through the remainder of the plaintiff's farm. In 1865 the defendants demised to one Alexander Cairns the farm lying above the plaintiff's farm, the general words of the demise including the words "waters and watercourses." In 1870 the plaintiff entered into the occupation of the farm in respect of which he is now suing, and in 1875 the defendants executed to him a lease of the farm, creating a term as from the year 1870. This lease reserved to the defendants a right to enter upon the demised premises, and view and repair or make anew the watercourses which then were or should at any time during the term be carried through the lands, and to make such alterations therein as they should think necessary; and it also contained a covenant on the part of the lessors that it should be lawful for the plaintiff peaceably and quietly to hold, possess, and enjoy the demised premises during the term, without any eviction, interruption, or denial from or by the lessors, or any person lawfully claiming through or under them. It further contained a covenant by the lessors to drain such portions of the demised land in such manner and at such times as they might deem necessary. At some time prior to the year 1880, some of the water passing down the drains in Cairns's farm escaped at a spot within that farm and near the borders of the plaintiff's, and more or less filled or saturated a depressed area which has been indicated by the referee on the plan referred to him by a contour line of 220·85 above a datum line. This area lies principally within Cairns's farm, but extends also into the plaintiff's farm. From the plaintiff's counsel we understand the point of escape or overflow to have been near where the settling well is marked on the plan, and the lie of the land makes this very probable, as it is apparently the lowest spot of the depressed area. The plaintiff's land and crops were injured within so much of this depressed area as lies within the plaintiff's farm. In order apparently to correct this result, the defendants in 1880 sank the settling well in the lowest spot of the depressed area, and carried a new drain from it in a circuit, so as to join the long drains lower down on the plaintiff's farm, and thus relieve the drains through the upper part of his farm. Since the construction of this new drain in 1880, no damage has, according to the statement of the plaintiff's counsel, arisen in field O. The fact of this improvement having been made by the defendants in 1880 may suggest to the mind that the original construction of the drainage system in Cairns's land was defective; but no such point has been raised on the pleadings or by the questions addressed to the referee, and we cannot therefore, as against the defendants, conclude that there was any such defect, but must hold that the overflow was, or might have been, caused by an excessive user on the part of Cairns of a system properly constructed for the purpose intended. If the system was inadequate for the needs of the farm, Cairns should either have done the additional works himself, or have required his landlords, the defendants, to do them. Lower down in the plaintiff's farm than the field O is another field marked Q, through which was constructed a tile drain conduit, part of the long lines of drainage. This drain was imperfectly made, and has allowed the water to escape between the joints, and has so done damage to a portion of the field Q.

The questions for decision are—first, has the plaintiff any cause of action in respect of the damage done by the water to the plaintiff's land at O? and secondly, has the plaintiff any cause of action in respect of the damage in the field Q?

The lease to Cairns in 1865 appears to us to have conferred on him a right to use the drains through the plaintiff's land for the purpose of carrying away from his land so much water as they were adequate to carry, but not to have conferred any right to use the drains in his own land for the purpose of causing on his own land an accumulation of water which should overflow on to the adjoining lands of the plaintiff. It would be giving a very strained and violent effect to the words "waters and watercourses" in the lease

of 1865 if we held that they were an authority to the lessee thus to injure at once his neighbour and the soil of the demised farm by an accumulation of water. With regard, therefore, to the damage done to the field O, it appears to us that the defendants are not liable on the ground of causing or permitting the injury, for Cairns, and not they, caused or permitted it; they are not liable on the ground that it is a disturbance by a person lawfully claiming under them, because the lease gave Cairns no lawful claim to do the act complained of; they are not liable on the ground that they demised to Cairns a thing dangerous or injurious to the plaintiff, even assuming such ground to be sufficient, for the drainage system is not found to have been improperly constructed, and it was injurious only when used to carry off more water than it could carry away: and, unless on one or other of these three grounds, we do not see that the defendants can be liable, whether under the covenant for quiet enjoyment or under the law for trespass or nuisance. In our opinion, therefore, the defendants are not liable for the damage done to field O.

As regards the damage done in field Q, different considerations apply, because the damage here has resulted to the plaintiff from the proper user by Cairns of the drains passing through the plaintiff's land, which were improperly constructed. In respect of this proper user, Cairns appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, and so to constitute a breach of the covenant for quiet enjoyment, for which the defendants are liable in damages. In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by Mr. Justice Willes in *Dennett* v. *Atherton* (14). But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected.

The judgment of the learned Judge must therefore be varied, and, in lieu of the directions he gave, there must be a direction to the referee to enquire what damage the plaintiff has suffered from the injuries done to the field Q by the water escaping from the drain. As the appeal has been partially successful and has partly failed, there will be no costs of this appeal.

Judgment varied.

Solicitors—T. W. Rossiter, agent for Hoyle, Shipley & Hoyle, Newcastle-upon-Tyne, for plaintiff; E. Bromley, agent for R. Douglas, Berwick-upon-Tweed, for defendants.

[IN THE COURT OF APPEAL.]

1884. Aug. 12. } TOMLINSON *v.* THE LAND AND FINANCE CORPORATION (LIMITED).*

Practice — Interpleader — Security for Costs—Claimant and Execution Creditor —Company in Liquidation.

In interpleader proceedings instituted by a sheriff, both the claimant and execution creditor are, in respect of security for costs, on the same footing as plaintiffs in ordinary actions.

A company in liquidation, although made defendants to the issue, may be ordered to give security for costs in interpleader proceedings instituted by a sheriff.

Appeal by the defendants from a decision of the Divisional Court.

In May, 1884, the defendants, being a company in liquidation, recovered judgment against a Dr. W. M. Rochfort for 91*l.* 13*s.* 6*d.* On the 31st of May the

* *Coram* Brett, M.R., and Bowen, L.J.

sheriff of Middlesex seized certain goods belonging to Rochfort which were at 104 Wilberforce Road, Finsbury Park. The present plaintiff then claimed the goods under a bill of sale, dated the 9th of December, 1879, given to him by Rochfort when residing at 162 Copenhagen Street, Barnsbury. On the 9th of June, 1884, an order for an interpleader issue was made, following appendix K, form 53, No. 4; and, pursuant to Order LVII. rule 7, the claimant was ordered to be made the plaintiff and the execution creditors the defendants in the issue. The claimant was ordered to pay into Court or give security for the sum of 75*l.*, which was stated to be the value of the goods seized. On the 16th of June the claimant paid 75*l.* into Court, and on the same day delivered a draft interpleader issue. On the 24th of June the claimant applied at chambers that the company should be ordered to give security for costs upon the ground that they were in liquidation. The Master refused the application.

On appeal from the decision of the Master, Denman, J., although then of opinion that the Master was right, at the request of counsel referred the matter to the Court.

The Divisional Court (Lopes, J., and Cave, J.), being of opinion that the company were seeking the aid of the Court to enforce their judgment, and were substantially the plaintiffs, ordered them to give security; and, in default of such security being given, that they should be barred, and that the money paid into Court should be paid out to the plaintiff.

The defendants appealed.

R. T. Reid, Q.C., and *A. G. McIntyre*, for the defendants.—The question is whether the company are substantially plaintiffs or defendants in the issue. The company are in liquidation, and, if the plaintiffs in the issue, the rule that an insolvent person suing on behalf of others may be ordered to give security would apply. But they are not substantially the plaintiffs. Order LVII. rule 15 no doubt gives jurisdiction to the Court to order security for costs to be given; but that must be subject to the rule laid down in *Belmonte* v. *Aynard* (1), that a person who is substantially the defendant is not to be called upon to give security. It would appear from *Williams* v. *Crossling* (2) that the question depends upon the circumstances of each case. Moreover, the question there was not as to whether the goods belonged to the judgment debtor; and the judgment was founded upon the particular facts of that case. *Mellin* v. *Dumont* (3) only shews the manner in which the order for security when made is to be enforced; it does not touch the grounds of the decision in *Williams* v. *Crosling* (2).

T. W. Chitty, for the plaintiff.—*Belmonte* v. *Aynard* (1) does not apply; that was not the case of a sheriff's interpleader, and makes the difference pointed out in *Williams* v. *Crossling* (2), so that none of the special reasoning with respect to sheriffs' interpleaders was applicable. The Interpleader Acts were for the benefit of sheriffs, and were not intended to interfere with the rights of parties.

[He was stopped.]

Brett, M.R.—It seems to me that in the case of interpleader proceedings instituted by the sheriff when he has levied execution under a judgment, and where there is a claimant and an execution creditor, the case of *Williams* v. *Crossling* (1) would apply, and the reasoning of that case would be right. If the relation between the two parties be taken into consideration, both the claimant and the execution creditor would be plaintiffs, if there were no Interpleader Act; and both would claim the benefit of the law in their own favour. Neither could be said to be defendant more than the other, for they are more like plaintiffs than defendants, and the sheriff having slipped out they are both entitled to the interference of the law. The rule therefore that a defendant is not to be ordered to give security for costs does not apply in this case. What rule, then, does apply? Order LVII. rule 15 says that in interpleader proceedings the Court may make all such orders as to costs and all other matters as may be just and reasonable.

(1) Law Rep. 4 C.P. D. 221; on appeal, 352.

(2) 3 Com. B. Rep. 657; 16 Law J. Rep. C.P. 112.

(3) 17 W.R. 673.

Now it is only just and reasonable that the parties should be made to fight on equal terms; and if one of the parties is not in a position to pay costs, or if costs could not be enforced against him, then security ought to be given. The rule with regard to such cases as I have stated is not the necessary rule in all other cases, but the view which we have taken is not inconsistent with the cases of *Belmonte* v. *Aynard* (1) and *Mellin* v. *Dumont* (3). The appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. It seems to me that under interpleader proceedings by the sheriff the Court can make such orders as may be just, to make the parties fight on something like equal terms. It is true that in ordinary practice the party who claims the goods is made the plaintiff in the issue and is called upon to establish his claim.

But the parties, although called plaintiff or defendant, are both to a certain extent actors, and persons who, if the law were left to take its ordinary course, would be entitled to the order against the sheriff. But the Interpleader Acts have allowed the sheriff to slip out of the noose, and have left the parties to fight the matter out; but, notwithstanding that, each party has more or less a vital interest in the result. A sheriff's interpleader is a special case in which one cannot take the ordinary terms "plaintiff" and "defendant" and apply them to an execution creditor and debtor. The parties are in the same position as those in *Williams* v. *Crossling* (2).

I agree with the Master of the Rolls that this decision does not conflict with that of *Belmonte* v. *Aynard* (1), which was not the case of a sheriff's interpleader at all.

Appeal dismissed.

Solicitors—Smiles, Binyon & Ollard, for plaintiff; J. J. Harlow, for defendants.

BANKRUPTCY. 1884. June 26. } *In re* STRAND; *ex parte* THE BOARD OF TRADE.

Bankruptcy—Costs—Scheme of Arrangement—Meeting of Creditors—Attendance of Solicitor—Bankruptcy Act, 1883, *s.* 105 —"*Costs of and incidental to any Proceeding in Court*"—*Bankruptcy Rules*, 1883, *rule* 100.

A County Court Judge, sitting in Bankruptcy, allowed out of the debtor's estate the costs of the attendance of the petitioning debtor's solicitor at a meeting of creditors for confirming a scheme of arrangement of the debtor's affairs:—Held, *that those costs could not be allowed, not being "costs of or incidental to any proceeding in Court" within the meaning of the Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 105.

This was an appeal in Bankruptcy by the official receiver, under the direction of the Board of Trade, against an order of the Judge of the Canterbury County Court, whereby he allowed out of the debtor's estate the costs of the attendance of the petitioning debtor's solicitor at a meeting of creditors held for confirming a scheme of arrangement of the debtor's affairs, as well as at the public examination of the debtor.

M. D. Chalmers, for the appellant.—The meeting of creditors was not a "proceeding in Court" within the words of the Bankruptcy Act, 1883, s. 105, which enacts that, "subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court"; and therefore the County Court Judge had no power to allow the costs of the attendance of the debtor's solicitor at that meeting. No doubt the Bankruptcy Rules, 1883, rule 100, say that "all costs shall be in the discretion of the Court"; but the Act, s. 127, sub-s. 4, expressly provides that general rules under the Act are not to extend the jurisdiction of the Court, and consequently rule 100 must be read as applying only to such costs as are referred to in section 105. [He took,

also, other objections, which are not material to be stated.]

Winslow, Q.C., and *J. E. Linklater*, for the debtor and his solicitor.—The public examination of the debtor is clearly a "proceeding in Court," the Act enacting, by section 17, that, "where the Court makes a receiving order, it shall hold a public sitting on a day to be appointed . . . for the examination of the debtor"; and by section 18, that a meeting for confirmation of a scheme of arrangement "shall not be held until after the public examination of the debtor is concluded." But any meeting at which the debtor can be examined is an occasion on which a solicitor may be employed at the expense of the estate if the Court in its discretion allow the costs; for the whole of the proceedings in a bankruptcy is a "proceeding in Court."

[CAVE, J.—There may be reason for allowing a solicitor to attend upon an occasion when a Judge presides, but where a layman presides the case is different.]

A scheme of arrangement needs to be properly drafted, and the presence of a solicitor was desirable for that reason. Though the Bankruptcy Rules may be incapable of extending the power of the Court to allow costs, the rules nevertheless, where they attribute to the Court a particular power, ought to have weight given to them in construing the Act. And the rules clearly construe the words of section 105, "the costs of and incidental to any proceeding in Court," as including all costs incidental to proceedings in bankruptcy: that appears not only from rule 100, but also from rule 13. Further, the Court has power to allow costs apart from any special statutory provision—*Ex parte Pearce; in re Mew* (1).

Chalmers, in reply.—Effect must be given to the words "in Court" in section 105. Rule 100 is in Part I. of the Rules, and that part relates to Court procedure; therefore there was no necessity for limiting the language of rule 100 to proceedings in Court. *Ex parte Pearce; in re Mew* (1) was decided under the Act of 1869, which had no such provision as that of section 105. As to the supposed advantage of the attendance of a solicitor to assist in settling a scheme, that cannot be wanted at a meeting for confirming a scheme, for by rule 159 the terms of the scheme are to be settled at the first meeting, and the subsequent meeting is to be for confirming or rejecting it.

MATHEW, J. (after dealing with certain points not material to be stated).—The Bankruptcy Act, 1883, says by section 105 that, subject to the Act and to general rules, "the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court." The language of the Bankruptcy Rules, 1883, rule 100, is more general, and says that "all costs shall be in the discretion of the Court"; but that must be read as meaning all costs referred to in the statute. This meeting of creditors for confirming or rejecting the scheme of arrangement of the debtor's affairs was not a "proceeding in Court," and therefore I think these costs could not be allowed.

CAVE, J.—I am of the same opinion, and for the same reasons.

Order reversed.

Solicitors—Solicitor to Board of Trade, for appellant; A. R. Norman, for respondents.

(1) 45 Law J. Rep. Bankr. 144; Law Rep. 2 Ch. D. 320.

1884. June 17. SUMMERS AND OTHERS (*petitioners*) *v.* MOORHOUSE AND OTHERS (*respondents*). WAKEFIELD MUNICIPAL ELECTION PETITION.

Municipal Election—Aldermen—Voting Paper—Signature by other than Voter named in Body—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 60.

At an election of aldermen under the Municipal Corporation Act, 1882, *section* 60, *certain voting-papers were signed in a name other than that written at the top after the words "I, the undersigned." Upon petition, it was objected that those papers were therefore void. Evidence was tendered shewing that they were signed and*

personally delivered to the chairman, with the intention of thereby voting for the candidates named thereon, by the persons in whose names they were signed:—Held, *that such evidence was admissible, and that the voting-papers were proper to be counted.*

Upon the trial of this petition a case was stated by the commissioner, which was in substance as follows:—

This was a petition under the Municipal Corporation Act, 1882, against the return of the four respondents as aldermen for the borough of Wakefield, praying that it might be determined that they were not duly elected, and that J. Connor and T. Howden were duly elected and ought to have been returned.

The following facts were admitted or proved:—

At the election of aldermen, held on the 9th of November, 1883, pursuant to the Municipal Corporation Act, 1882 (45 & 46 Vict. c. 50), s. 60, the four respondents were the liberal candidates, and J. Connor and T. Howden were the conservative candidates. The number of vacancies to be filled up was four. The number of votes recorded for the respective candidates was, for each of the four respondents 16, and for J. Connor and T. Howden 12 each; making a majority of four for each of the respondents, who were declared by the chairman to be duly elected. Eight of the voting-papers for the respondents contained, when delivered to the chairman, in writing at the top, immediately after the words "I, the undersigned," a name different from the name written at the foot, each being the name of a person entitled to vote. The following is a copy (so far as material) of one of those papers, the other seven papers being, *mutatis mutandis*, to the same effect:—

"I, the undersigned Francis Milthorp, being one of the members of the council of the . . . . borough entitled to vote in the election of aldermen . . . . do hereby vote for the following persons to be aldermen . . . .

Christian name and surname of the persons for whom I vote	Their respective places of abode	Their respective descriptions
George Moorhouse	Northgate	Grocer.
George Mander	Margaret Street . . .	Solicitor.
Benjamin Peacock	Westgate	Grocer.
Reuben Reynolds	Sandal Magna . . .	Corn-miller.

"Dated this 9th day of November, 1883.

"William Lee Sellers."

It was contended on behalf of the petitioners that those eight voting-papers were void as being uncertain and ambiguous, and that no evidence was admissible to explain this ambiguity or to shew by what voters they were used. The commissioner was of opinion and found that without such explanatory evidence such papers were invalid; but he admitted (subject to all just exceptions) evidence tendered by the respondents to shew the circumstances under which the voting-papers were filled up and the persons by whom they were signed and used; which was to the following effect: All these eight papers were filled in at the top by the town clerk with the names of the respective voters by whom they were intended to be used. They were then handed by him to one Mr. Horner, who acted on behalf of the liberal voters. Mr. Horner thereupon inserted in each of the papers the names, places of abode, and descriptions of each of the respondents as candidates, and proceeded to distribute them among the respective voters by whom they were intended to be used, and in so doing he inadvertently handed each of the eight papers to a person other than the one whose name appeared at the top of such paper and to whom he intended to deliver it. Each of the persons who so received a paper thereupon, without discovering the error, signed his name at the

foot of it, intending by so doing to make it his voting-paper and to vote for the persons named thereon, and, after so signing his name, personally delivered it as such voting-paper to the chairman, who then read out the names appearing at the foot of each paper as the names of the persons voting respectively for the candidates named therein. If the above evidence was admissible the commissioner found as a fact that it was true, and consequently held that the eight papers were valid voting-papers and that the respondents were duly elected. He, with the consent of the parties, stated this Case as a way of reserving for the opinion of the Court the question whether the above evidence was admissible to explain the eight voting-papers, or whether the voting-papers were so ambiguous and contradictory as to render parol evidence to explain them inadmissible.

If the Court should decide that the evidence was admissible, the commissioner intended to certify that the respondents were duly elected; but if the Court should be of the contrary opinion, then to certify that the respondents were not duly elected, and that J. Connor and T. Howden were duly elected and ought to have been returned.

Mattinson, for the petitioners.—These voting-papers were bad on the face of them, and could not be made good by parol evidence.

He referred to *Rowley* v. *The Queen* (1) and *In the goods of Hunt* (2).

Cyril Dodd, for the respondents, was not called on.

MATHEW, J.—In this case objection is made to eight voting-papers at an election of aldermen, each of which respectively was handed in by a person entitled to vote and signed by him, that they (to take the instance given in the case, which the others *mutatis mutandis* resemble) began, "I, the undersigned Francis Milthorp," and were signed in a different name, "William Lee Sellers," and that this use of two names rendered the voting-papers ambiguous and uncertain, and therefore void. In order to determine the question we must turn to the Act. The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 60, dealing with the election of aldermen, says by sub-section 4: "Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies by signing and personally delivering at the meeting to the chairman a voting-paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes;" sub-section 5: "The chairman, as soon as all the voting-papers have been delivered to him, shall openly produce and read them, or cause them to be read . . . . ": sub-section 7: "The persons, not exceeding the number of vacancies, who have the greatest number of votes, shall be declared by the chairman to be, and thereupon shall be, elected." Each of the voting-papers now in question was signed and delivered to the chairman by a person entitled to vote, and contained the names, places of abode, and descriptions of the persons for whom he desired to vote. I think, therefore, that the chairman acted rightly in receiving these voting-papers and treating them as valid voting-papers, and that the learned commissioner acted rightly in admitting evidence to shew the persons by whom they were signed and used.

DAY, J.—I concur.

Judgment for the respondents.

(1) 14 Law J. Rep. Q.B. 62.

(2) 44 Law J. Rep. Prob. & M. 43; Law Rep. 3 P. & D. 250.

Solicitors—H. B. Clarke & Son, agents for Harrison & Beaumont, Wakefield, for petitioners; Van Sandau, Cummings & Armitage, agents for C. W. Hall, Wakefield, for respondents.

1884. July 11. } THE QUEEN *v.* NILLINS.

Extradition Act, 1870 (33 & 34 *Vict.* c. 52), *s.* 26—*Fugitive Criminal—Crime committed in Foreign Country by Person "in Her Majesty's Dominions."*

[For the report of the above case, see 53 Law J. Rep. M.C. 157.]

1884. July 3. } BARNES AND COMPANY *v.* TOYE.

Infancy—Necessaries—Infant already supplied—Evidence.

An infant who was sued for the price of goods supplied to him on credit tendered evidence that he was already sufficiently supplied with goods of the kind in question:—Held (*dubitante* MANISTY, J.), *that the evidence was admissible, although it was not alleged that the plaintiffs knew that the defendant was so supplied.*

This was an action by tailors for the price of goods sold and delivered, to which the defendant pleaded infancy. At the trial, before Smith, J., and a jury, the defendant gave evidence that he was already sufficiently supplied with goods of the kind in question, but it was not suggested that the plaintiffs knew the fact. Smith, J., directed the jury to disregard that evidence, and a verdict was found for the plaintiffs. A motion was now made on behalf of the defendant for a new trial on the ground of misdirection.

T. J. Bullen, for the defendant.—The goods supplied were not necessaries for the defendant, if he was already sufficiently supplied with such things; and that the plaintiffs may not have known the fact is immaterial—*Foster* v. *Redgrave* (1), following *Bainbridge* v. *Pickering* (2) and *Brayshaw* v. *Eaton* (3). *Ford* v. *Fothergill* (4), *Cook* v. *Deaton* (5), *Story* v. *Pery* (6), *Steedman* v. *Rose* (7), and *Burghart* v. *Angerstein* (8) are also direct authorities for the defendant, shewing that the plaintiffs trusted the defendant at the peril of its turning out that he was already sufficiently supplied.

[FIELD, J., referred to *Debenham* v. *Mellon* (9).]

(1) Law Rep. 4 Exch. 35*n*.
(2) 2 W. Black. 1325.
(3) 7 Scott, 183; 5 Bing. N.C. 231.
(4) 1 Esp. 211.
(5) 3 Car. & P. 114.
(6) 4 Car. & P. 526.
(7) Car. & M. 422.
(8) 6 Car. & P. 690.
(9) 50 Law J. Rep. Q.B. 155; Law Rep. 6 App. Cas. 24.

In *Ryder* v. *Wombwell* (10) the decision of the majority in the Court of Exchequer that evidence of the defendant being already sufficiently provided was inadmissible unless the fact was known to the plaintiff was not affirmed by the Exchequer Chamber.

W. F. A. Archibald, for the plaintiffs.—There was no misdirection. The decision of the Court of Exchequer in *Ryder* v. *Wombwell* (10) that such evidence is inadmissible is a direct and the latest authority, and is moreover in accordance with principle and authority. It has long been settled that by "necessaries" for an infant things which are strictly necessary are not alone meant — *Peters* v. *Fleming* (11). *Burghart* v. *Hall* (12) shews that an infant may be sued for "necessaries" although he is supplied by his friends with money enough to make it unnecessary for him to buy on credit. And *Dalton* v. *Gib* (13) shews that the apparent, as distinguished from the real, circumstances of the infant are to be looked to. The cases which have been cited for the defendant are distinguishable from the present by the fact that there the infant was known by the persons who supplied him with the goods to be an infant, and was either a person living with his parents or a person *in statu pupillari* (such as the undergraduate in *Foster* v. *Redgrave* (1)), and presumably supplied by his parents or the college, as the case might be, with what he wanted.

FIELD, J.—This is an action for goods sold and delivered. The defendant pleaded infancy. There was nothing in the nature of the articles supplied to shew on the face of things that they were not proper for a person in the defendant's position in life. But the defendant, by way of shewing that they were nevertheless not necessaries, gave evidence to shew that he was already well supplied with articles of the kind in question—that is to say, that he had already an ample supply of clothes in his wardrobe. The learned Judge before whom the case was tried directed the

(10) 37 Law J. Rep. Exch. 48; 38 ibid. 8; Law Rep. 3 Exch. 90; ibid. 4 Exch. 32.
(11) 6 Mee & W. 42.
(12) 4 Mee & W. 727.
(13) 5 Bing. N.C. 198.

jury that that fact was immaterial unless it was known to the plaintiffs. I am of opinion that that direction was wrong.

It has been contended on behalf of the plaintiffs that the course taken by the learned Judge was warranted by *Ryder* v. *Wombwell* (10). But the Exchequer Chamber said:—"It becomes . . . . unnecessary to decide whether the evidence tendered was properly rejected or not. . . . . If ever the point again arises, the Court before which it comes must determine it on the balance of authority and on principle without being fettered by a decision of this Court." And I think that in giving my judgment I need not feel the question to be concluded by the authority of that case.

The law is that up to twenty-one years of age a person is considered incapable of taking care of himself, and is therefore in general unable to enter into a contract which will be binding upon him. But he needs meat and drink, &c., and therefore the law allows him to bind himself to pay for them. The law already said that in Coke's time, though limiting his capacity, to bind himself by contract, to contracts for things which were strictly necessaries; and in more modern times, as shewn by *Peters* v. *Fleming* (11), his capacity to contract has been somewhat enlarged, by extending it beyond things which are strictly necessary. In *Burghart* v. *Hall* (12) it has further been held that the fact of an infant having a sufficient supply of ready money does not disable him from binding himself by a purchase on credit. Then comes the question with which we have now to deal, namely, Does the fact of an infant being already sufficiently supplied with articles such as those which he orders on credit prevent his being able to bind himself to pay for the latter? The fact of an infant having a previous supply was, as I understand, held by the Court of Exchequer in *Ryder* v. *Wombwell* (10), Baron Bramwell dissenting, to be immaterial unless the plaintiff knew the fact. But the Exchequer Chamber said what I have already read.

The last reported case is not necessarily to be followed when it conflicts with others. And *Foster* v. *Redgrave* (1), which was not cited in the Court of Exchequer in *Ryder* v. *Wombwell* (10), and was a decision of Mr. Justice Blackburn and Mr. Justice Mellor, had previously held that the fact of an infant having a previous supply disentitled the plaintiff to recover, although the plaintiff did not know the fact—acting on *Bainbridge* v. *Pickering* (2) and *Brayshaw* v. *Eaton* (3). In *Brayshaw* v. *Eaton* (3), where *Ford* v. *Fothergill* (4) and other cases were cited in argument, Mr. Justice Bosanquet said that if a man supplied an infant with a reasonable quantity of goods without enquiring whether the infant already had a sufficient supply, he did so at the risk of its turning out afterwards that they were not necessary by reason of the infant being already sufficiently supplied. And Chief Justice Tindal said the verdict must depend, not upon the degree of knowledge acquired by the tradesman as to the infant's circumstances, but upon whether the goods were necessaries or not. There is, I think, notwithstanding the ruling of a majority of the Court of Exchequer in *Ryder* v. *Wombwell* (10), a balance of authority in favour of the defendant. I am of opinion that the jury should have been asked the question, Was the defendant so supplied as not to be in want of these things? and that accordingly there must be a new trial.

MANISTY, J.—In this case my brother Smith directed the jury to disregard certain evidence on the authority of *Ryder* v. *Wombwell* (10). Sitting at Nisi Prius, I do not see how he could have done otherwise than act on the authority of *Ryder* v. *Wombwell* (10); and indeed I have had some doubt whether it is open to us to entertain the question which has been raised before us. However, my brothers Field and Lopes being of opinion that we ought to entertain it, my refusing to do so would have no effect upon the judgment of the Court. And, without dissenting from the rest of the Court, I will only say that *Brayshaw* v. *Eaton* (3) seems to me not to be entitled to so much weight as my brother Field has given to it, the Court there discharging the rule obtained on behalf of the defendant.

LOPES, J.—But for the observations which have been made by my brother Manisty, I should have said I had no

doubt as to what our judgment ought to be.

I am of opinion that the direction of my brother Smith was wrong. The law is that an infant is not liable upon a contract save for necessaries, the policy of the law being to protect the infant, but for his own sake to allow him to contract for necessaries. In order to determine what are necessaries, it must be necessary to look to what the infant already has. Suppose an infant to buy a watch when he already has several; can the watch nevertheless be considered to be necessary for him? It has been contended that unless the plaintiff knows the fact of the infant having a previous supply the infant is not protected. But so to hold would, in my judgment, nullify the law. We have been pressed on behalf of the plaintiffs with the authority of *Ryder* v. *Wombwell* (10); and it has been argued that it is a decision of a co-ordinate Court and later in date than *Foster* v. *Redgrave* (1). Its being a later decision is not, in my opinion, sufficient to require us to follow it; and, considering that *Foster* v. *Redgrave* (1) was not cited in the Court of Exchequer in *Ryder* v. *Wombwell* (10), that the Exchequer Chamber there said that if the point should again arise the Court before which it came must determine it on the balance of authority and on principle without being fettered by the authority of the Exchequer Chamber, and considering further that there was, previously to *Ryder* v. *Wombwell* (10), an unbroken chain of authority in favour of the view which I take, I am of opinion that the question should have been put to the jury, Was the defendant already well supplied with things such as those supplied to him by the plaintiffs?

Rule absolute for new trial.

Solicitors—J. L. Blaxland, for plaintiffs; T. R. Watson, for defendant.

1884. March 12. CALLENDER *v.* WALLINGFORD. YOUNG AND OTHERS, *third parties.*

Practice—Third Party—Defence available to Defendant—Leave to Defend—Order XVI. rules 48, 49, 52, *and* 53.

Where a third party has been properly brought in upon notice by the defendant, he is entitled to set up, as against the plaintiff's claim, any defence which would have been available to the defendant.

This was an appeal from Mathew, J., at chambers, reversing the order of the Master.

The action was brought upon a bond. The defendant put in a defence and issued a third-party notice. Upon a summons for directions, the Master made an order giving the third party liberty to defend the action. On appeal, Mathew, J., limited the defence of the third party to a mere denial of the bond.

The third party appealed.

J. M. Lloyd (with him *McIntyre, Q.C.*), for the third parties.—The third party is entitled to the benefit of any set-off he may have as against the plaintiff, as well as against the defendant; and is entitled to avail himself of any defence or set-off that the defendant might have, although the defendant may not have chosen to set it up. Otherwise a collusive plaintiff and defendant might obtain judgment against a third party wrongfully. The procedure really amounts to an action against the third party.

Swinfen Eady, for the plaintiff.—The third party is not entitled to set up a defence against the plaintiff that the defendant has not chosen to set up. If he appears he is not bound by the judgment except as to the issues found against him. Of course he may avail himself of any defence he may have as against the defendant, but cannot make use of the defendant's defence to the claim by the plaintiff, and so prevent the plaintiff from taking advantage of the defendant's admission.

LORD COLERIDGE, C.J.—It is to be observed that the present rules as to third-party practice have a much more limited

sphere of action than the old ones, because the first clause of Order XVI. rule 48 (1) limits the cases in which a third party can be brought in, to those in which a defendant claims to be entitled to "contribution or indemnity," and governs the whole of the following provisions.

(1) Order XVI. rule 48: "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave of the Court or a Judge issue a notice (hereinafter called the third-party notice) to that effect stamped with the seal with which writs of summons are sealed. . . ."

Rule 49: "If a person not a party to the action who is served as mentioned in rule 48 (hereinafter called the third party) desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given on his own liability to the defendant, the third party must enter an appearance in the action within eight days of the service of the notice. In default of his so doing he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice. Provided always that a person so served and failing to appear within the said period of eight days may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a Judge shall think fit."

Rule 52: "If a third party appears pursuant to the third-party notice, the defendant giving notice may apply to the Court or a Judge for directions, and the Court or a Judge upon the hearing of such application may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claim in whole or in part, order the question of such liability as between the third party and the defendant giving notice to be tried in such manner at or after the trial as the Court or Judge may direct; and if not so satisfied may order such judgment as the nature of the case may require to be entered in favour of the defendant giving notice against the third party."

Rule 53: "The Court or a Judge upon the hearing of the application mentioned in rule 52 may, if it shall appear desirable to do so, give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action."

In this case the third party is admittedly one "against whom indemnity is sought," and therefore is not beyond the limits of the rule. The terms of rule 49 clearly contemplate the possibility of such a person desiring to dispute the claim made by the plaintiff against the defendant; and it may be very material to the third party to be able to dispute it, since it is a condition precedent to one who indemnifies being called upon to satisfy the indemnity that the person indemnified has been obliged to pay. Rule 53 puts it beyond doubt that the Court or a Judge, if it shall appear desirable, may give the third party liberty to defend the action—that is, in fact, may put him in the place of the defendant. It is obvious that there may be cases where even without collusion, and *a fortiori* with collusion, it may not suit the defendant to defend, and in such cases I think the third party should be allowed to take his place. In this case, therefore, I think the third party should have general leave to defend, and not be limited as he is by the order of Mr. Justice Mathew. Had he had the same materials as we have on this rehearing of the case it is probable he would not have so restricted it; but the circumstances of the application to him were admittedly such as to preclude the matter being fully gone into. I do not decide that the pleas suggested should be specifically allowed; the third party must plead at the peril of having his pleas objected to, as in the case of an ordinary litigant.

WILLIAMS, J.—I am of the same opinion. The defendants, under Order XVI. rule 48, brought in the third party by notice, on the ground of a claim to an indemnity. On the hearing of an application for directions under rule 52 (1) the third party applied for liberty to defend the action, which rule 53 (1) gives the Court power to grant. The Judge refused to give more than a restricted liberty, but I think the third party ought to have full liberty to defend.

It is conceivable that in some cases it may be injurious to the third party to be put in the position of the defendant, as, for instance, where there have been admissions by the defendant or estoppel by his conduct, in which case the proper course would be an application to be dis-

charged from the third-party order, or to limit the scope of the judgment as against him.

Here, however, the third party is content to be put in the place of the defendant, and I think he should have leave to put in such defences as would be available to the defendants, and no more.

Order accordingly.

Solicitors—Rogers & Chave, for plaintiff; Merediths & Co., agents for Hamlin & Whitty, Brighton, for defendant; Turner & Co., for third party.

[IN THE COURT OF APPEAL.]

1884. June 21, 23. July 12. } THE PLUMSTEAD DISTRICT BOARD OF WORKS *v.* SPACKMAN.

Metropolis — Building beyond Line of Street — Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 —"*General Line of Buildings*"—"*To be decided by the Superintending Architect*" —*Jurisdiction of Magistrate—Architect's Decision.*

[For the report of the above case, see 53 Law J. Rep. M.C. 142.]

[IN THE COURT OF APPEAL.]

1884. May 29. } THE QUEEN *v.* THE WEST BROMWICH SCHOOL BOARD.

Poor — Rating — School Board — Land owned and Land rented by School Board— Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 18, 19, 21, 22, *and* 53—6 & 7 *Will.* 4. *c.* 96. *s.* 1.

[For the report of the above case, see 53 Law J. Rep. M.C. 153.]

1884. July 29. Aug. 12. } *In re* J. A. MAY; *ex parte* E. MAY.

Bankruptcy — Administration Order— "Estate to be administered according to the Law of Bankruptcy"—"Within two months of the date of the Grant of Letters of Administration"—Notice to Administratrix of Application for Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 2, 3, 4, 9, *and* 10.

An application to the "Court having jurisdiction in bankruptcy," to which a creditor's administration suit in the Chancery Division has been transferred under the Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-s.* 4, *for an order for the administration of the estate of a deceased debtor according to the law of bankruptcy, may be made ex parte, but not until the expiration of two months from the date of the grant of probate or letters of administration.*

This was a motion to rescind an administration order made by the Registrar of the Macclesfield County Court under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (1), on the 18th of July, 1884.

(1) 46 & 47 Vict. c. 52. s. 125, sub-s. 1: "Any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy."

Sub-sec. 2: "Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shewn, dismiss such petition, with or without costs."

Sub-sec. 3: "An order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the Court that the debtor committed an act

In re May; ex parte May.

J. A. May died intestate on the 24th of March, 1884, and the applicant, E. May, took out letters of administration of his estate on the 12th of June, 1884, on which day an administration action was commenced by a creditor of the deceased in the Chancery Division of the High Court, which, by order of Kay, J., was transferred to the Macclesfield County Court, and that Court, on the 18th of July, 1884, made an order that the estate of the said E. May should be administered according to the law of bankruptcy.

The administratrix appealed.

Cooper Willis, Q.C. (with him *Tyssen*), in support of the appeal.—The order cannot be made until two months after the order to transfer under the sub-section 4 (1), for if it can the effect of sub-section 3 (1) might be got rid of simply by bringing an action and getting it transferred. Sub-section 1 of section 125 (1) says that the petition must be in the prescribed form; and though there is no actual provision for notice, it is a *casus omissus*, and notice of such petition is necessary under Bankruptcy Rules 19 and 20 (2).

Winslow, Q.C. (with him *R. Vaughan Williams*).—There is no need of an application to transfer, as the Court is bound to transfer; and form 32 shews that it is not contemplated to have proof of anything but of an administration suit brought and transferred. Notice, therefore, is not necessary, and no form of notice is provided. The notice required by sub-section 9 (1) is notice of the act of bankruptcy, not of any application for such an order as this.

The limit of time only applies where no action has been brought or transferred.

The following judgment of the Court (Hawkins, J., and Wills, J.) was delivered (on August 12), by

WILLS, J.—This is an application, on behalf of the administratrix of J. A. May, that an administration order, made under section 125 of the Bankruptcy Act, 1883, in virtue whereof the property of the intestate vests in the official receiver instead of remaining in the administratrix, may be rescinded, on the grounds—first, that the Registrar had no power to make such an order before the expiration of two months from the date of the grant of letters of administration; and, secondly, that such order was made *ex parte*.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52. s. 125, sub-s. 1 (1), any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present a petition to have the estate administered according to the law of bankruptcy. By sub-section 2 (1) an order to have the estate administered according to the law of bankruptcy may be made upon proof of the

of bankruptcy within three months prior to his decease."

Sub-sec. 4: "A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor."

Sub-sec. 9: "Notice to the legal personal representative of the deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid, nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration."

Sub-sec. 10: "Unless the context otherwise requires, . . . 'creditor' means one or more creditors qualified to present a bankruptcy petition as in this Act provided."

(2) Rule 19: "Every application to the Court (unless otherwise provided by these rules, or the Court shall in any particular case otherwise permit) shall be made by motion supported by affidavit."

Rule 20: "Where any party other than the applicant is affected by the motion no order shall be made, unless upon the consent of such party duly shewn to the Court, or upon proof that notice of the intended motion and copy of the affidavits in support thereof have been duly served upon such party. . . ."

petitioner's debt, unless the Court is satisfied that there is reasonable ground for supposing that the estate will be sufficient for the payment of the debts of the deceased. By sub-section 3 (1) such an order shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the executor or administrator, or unless the petitioner proves to the satisfaction of the Court that the deceased had committed an act of bankruptcy within three months prior to his decease. By sub-section 4 (1) a petition for administration under the section shall not be presented to the Court—that is, of Bankruptcy—after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate; but that Court may in such case, on the application of any creditor—that is, of any creditor duly qualified under sub-section 10 (1)—and on proof that the estate is insufficient to pay the debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy; and thereupon such last-mentioned Court may in the prescribed manner make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made upon the petition of a creditor.

It will be convenient to consider first the second objection—namely, that the order now under appeal was *ex parte*.

Under section 125 an "order for administration" may be made by the Court —that is, the Court exercising jurisdiction in bankruptcy—within the jurisdiction of which the debtor resided or carried on business for six months immediately prior to his death, under two sets of circumstances. First, there may be a case in which no proceedings have been instituted for administration of the estate of the debtor; and, secondly, a creditor duly qualified may, upon mere proof of debt, obtain an "order for administration in bankruptcy," the onus of proving that the estate may be expected to be solvent, and that interference with the ordinary course of administration is therefore unnecessary, being thrown upon the executor or administrator.

One further condition is imposed by sub-section 3—namely, that if the order be made within two months of the death of the intestate, there must be either consent of the administrator or proof of an act of bankruptcy. After the lapse of that period mere proof of the debt, when the executor or administrator fails to satisfy the Court of the solvency of the estate, is sufficient to support the order. Secondly, the estate may be already in course of administration by legal process. In such case, by virtue of sub-section 4, the Court in which the administration action is pending may, on the application of a creditor, and on proof of the insolvency of the estate, transfer the proceedings to the proper Court for the exercise of bankruptcy jurisdiction; and when that is under these circumstances once seized of the case, it may "in the prescribed manner" make "an order for the administration of the estate of the deceased debtor" which is to have the like consequences with an administration order made under sub-section 1 on a creditor's petition, which is a synonym for saying that the order shall be for administration according to the law of bankruptcy. The form of the order to be made under sub-section 1 is given in the Appendix of Forms, No. 31. It directs that the estate be "administered in bankruptcy." The order to be made under sub-section 4 directs that "the estate be administered according to the law of bankruptcy pursuant to section 125." We think it impossible to draw any kind of distinction between the two as to their meaning or legal operation, and that each is an order for the administration of the estate of the deceased debtor," or "an order of administration under this section," according to the varying phraseology of different portions of section 125. The order is the same, and is made by the same Court in each case. It is only the machinery for obtaining it which differs. The one is obtained upon petition, the other without a petition. Section 125 starts with the provision applicable to proceedings by way of petition, and empowers the Court, unless satisfied of the solvency of the estate, to grant the administration order upon mere proof of the debt, a view

In re May; ex parte May.

which is supported by form 11, which is the form of a petition under section 125, and which (omitting a paragraph intended only for use in case the application be made within two months of the debtor's death) indicates proof of nothing except the place of residence of the debtor and the creditor's debt.

Then, under sub-section 4, before the transfer from the Court in which the administration suit is pending to the Court exercising bankruptcy jurisdiction can be had, it is necessary for the petitioner to be duly qualified, as required by sub-section 10 (1), which implies that he must prove that fact, and he must prove that the estate is insolvent. He must therefore prove more, and not less, than the petitioner under sub-section 1 before he can get the order of transfer. By form 11 he must summon the executor or administrator before he can obtain the order; and before the transfer is made, therefore, the executor or administrator must have been heard, or at least had the opportunity of being heard, to contest the very points, and the only points, which would be in controversy upon a creditor's petition, the only difference being one in his favour—namely, that in order to obtain the transfer, the creditor must accept the onus of proving the estate is insolvent instead of merely leaving the executor or administrator to prove to the Court, if he can, that the estate is solvent. Under these circumstances it seems preposterous to suppose that it can be necessary to have the same matters brought into controversy a second time in the Court to which the transfer has been effected before the administration order can be made. They have been already the subjects of adjudication by a competent Court, and the party concerned in denying them has been already heard upon them. We therefore see no reason why the order should not be made *ex parte*.

The other objection, however—that the order was made within two months of the date of letters of administration—appears to be fatal. The same considerations which have led us to the conclusion that there is no distinction between the order of administration under sub-section 1 and that under sub-section 4 makes it impossible to draw a distinction between them as to the application of sub-section 3. Whether the latter portion of that sub-section, providing for proof by the petitioner of an act of bankruptcy, be capable of being satisfied in case of proceedings under sub-section 4, may be open to discussion. There is no doubt, however, that the earlier portion, relating to the concurrence of the executor or administrator, is equally applicable in both cases; and there is therefore no inherent difficulty in giving their plain, natural, and unmistakable meaning to the words of sub-section 3, which says in terms that no such order as has been granted in the present case shall be granted until the lapse of two months from the grant of administration.

The appeal must therefore succeed, and the order of the County Court of the 18th of July be set aside, and the appellant must have her costs.

Solicitors—H. T. Raw, agent for Llewellyn & Ackrell, Tunstall, for appellant; Robinson, Preston & Stow, Hollinshead & Moody, Tunstall, for respondent.

1884. March 7, 8, 14. May 3. THE QUEEN (*on the prosecution of John Abbott*) *v.* THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBBING.

Sewers, Commission of—Liability to repair ratione tenuræ—Extraordinary Storm — Presentments — Orders — 3 & 4 Will. 4. c. 22. ss. 13 and 46.

[For the report of the above case, see 53 Law J. Rep. M.C. 113.]

1884. March 24. GARRETT *v.* THE LICENSING JUSTICES OF ST. MARYLEBONE.

Licensing Acts—Mortgagee—Power of Attorney—Renewal without Concurrence of Licence-holder—Appeal—Person aggrieved —9 Geo. 4. c. 61. s. 27.

[For the report of the above case, see 53 Law J. Rep. M.C. 81.]

[IN THE COURT OF APPEAL.]

SELBORNE, L.C.
COLERIDGE, L.C.J.
COTTON, L.J.
1884.
Feb. 13.
} *In re* JAMES (*a lunatic*).

Lunatic—Bankruptcy—Permission to Committee to file Declaration of Insolvency in Name of Lunatic—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (*f*) *and* 148.

If it appears to be for the benefit of a lunatic that he should be made bankrupt the Court will permit the committee to commit an act of bankruptcy in the name of the lunatic under the Bankruptcy Act, 1883, *s.* 4 (*f*).

This was a summons taken out by the committee of the estate of a lunatic, asking for leave to file in the Court of Bankruptcy, on behalf of the lunatic, a declaration of his inability to pay his debts, or in his name to present a bankruptcy petition against himself, and so commit an act of bankruptcy under the Bankruptcy Act, 1883, s. 4 (*f*).

The lunatic had been so found by inquisition, and his business had been carried on by his committee until the estate had proved insolvent, there being debts amounting to 2,135*l.*, and assets to only half that amount. One of the creditors had obtained a judgment for 30*l.* 8*s.* 5*d.*, and had issued execution, under which the sheriff had seized the machinery and stock-in-trade.

The summons was now adjourned into Court, and evidence was given to shew that in the event of a bankruptcy the principal creditors would consent to an allowance being made for the lunatic's maintenance.

Fischer, Q.C., for the summons.—The Court has jurisdiction to make the order asked for if it appears that it will be for the benefit of the lunatic—*Ex parte Roberts* (1), *In re Cohen* (2), and *In re Lee* (3). It will clearly be for the benefit of the lunatic in this case because the assets can be better disposed of in bankruptcy than if a sale is forced under the execution; and the principal creditors will more readily assent to some provision being made for the lunatic.

Daw, for the next-of-kin, consented to the application.

THE LORD CHANCELLOR (EARL OF SELBORNE) said that as it appeared to be for the benefit of the lunatic that he should be made bankrupt, the Court would make the order.

LORD COLERIDGE, C.J., and COTTON, L.J., concurred.

Solicitors — Willoughby & Winch, agents for Warne, Brighton.

(1) 1 Mont. & C. 653; 9 Law J. Rep. Bankr. 25.
(2) Law Rep. 10 Ch. D. 183.
(3) Law Rep. 23 Ch. D. 216.

1884.
June 10.
} THE QUEEN *v.* HASLEHURST.

Poor Law—Statutes 4 & 5 *Will.* 4. *c.* 76, *and* 31 & 32 *Vict. c.* 122—*Order of Local Government Board of* 1867—*Workhouse—Payment of Roman Catholic Clergyman—Power of Guardians—"Person in Holy Orders."*

[For the report of the above case, see 53 Law J. Rep. M.C. 127.]

1884.
July 4.
} THE QUEEN (*on the prosecution of Hooly*) *v.* THE JUSTICES OF STAFFORDSHIRE.

Practice—Writ of Mandamus—Return of Unconditional Compliance—Pleading over—Rules of 1883 (*Order LIII. rule* 9, *and Order LXVIII. rule* 1).

[For the report of the above case, see 53 Law J. Rep. M.C. 159.]

[IN THE COURT OF APPEAL.]

1884. July 14, 31. } HETHERINGTON *v.* GROOME.*

Bill of Sale—Seizure in Default of Payment on Demand—Power of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and* 13.

A bill of sale, made after the passing of the Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *contained an agreement by the mortgagor that he would, upon demand in writing, pay to the mortgagee the principal sum and interest; that it should be lawful for the mortgagee to enter upon the premises where the assigned effects might be, to seize and sell the same, if the mortgagor should make default in payment on such demand being made, or if any of the contingencies mentioned in section 7, sub-sections* 2, 3, 4, *and* 5 *of the Act, should happen; and provided that the effects assigned should not be liable to seizure for any cause other than those specified in section* 7 *of the Act of* 1882:— Held, *that the bill of sale was void, because it gave a power to seize in default of payment on demand, and not, as required by section* 7 *and the schedule of the Act, at a time therein provided or stipulated for payment.* Held, *further, by* BRETT, M.R., *and* FRY, L.J., *that the bill of sale was void under sections* 9 *and* 13 *of the Act, because the power of sale therein contained arose forthwith on the happening of any of the contingencies mentioned, and was not limited to the expiration of five clear days from the day of seizure, as required by section* 13 *of the Act of* 1882.

Appeal by the defendant from the judgment of Hawkins, J., at the trial of an interpleader issue.

The plaintiff was the holder of a bill of sale granted by one Ramsay, and he claimed to be entitled to certain goods which had been seized by the defendant, who was an execution creditor of Ramsay.

The bill of sale was made on the 29th of March, 1883, between George Ramsay, the mortgagor, and John Hetherington, the mortgagee, and witnessed that in consideration of 74*l.* paid by Hetherington to Ramsay, "the mortgagor doth hereby assign unto the said mortgagee all the household furniture situate" on certain premises "by way of security for payment of the said sum of 74*l.* and interest thereon at the rate of ten per cent. per annum; and the said mortgagor doth hereby agree and declare that he will, upon demand made in writing therefor, duly pay to the said mortgagee the principal sum of 74*l.*, together with interest thereon due, and also that it shall be lawful for the said mortgagee, his executors, administrators, and assigns, to enter upon the premises where the said chattels, effects, and furniture may be, and seize and take possession thereof, and to sell the same or any part thereof if the said mortgagor shall make default in payment of the aforesaid principal sum and interest on demand in writing made therefor aforesaid," or if the mortgagor do become bankrupt, suffer a distress, remove any of the goods from the premises, fail to produce the last receipt for rent and taxes, or if execution shall have been levied against the goods of the grantor under any judgment at law. The mortgagor covenanted to insure the property comprised in the bill of sale, and to pay the premiums; and it was further provided that, "on payment of the said principal sum and interest on demand therefor as agreed, the assignment of the furniture and effects hereinbefore contained shall become void, provided also that the furniture and effects hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagee, his executors, administrators, and assigns, for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

Hawkins, J., gave judgment for the plaintiff.

The defendant appealed.

J. E. Palmer, for the appellant, cited *In re Williams; ex parte Pearce* (1).

Kemp, Q.C., and *McCall*, for the plaintiff, cited *Davis* v. *Burton* (2).

Cur. adv. vult.

(1) 53 Law J. Rep. Chanc. 500; Law Rep. 25 Ch. D. 656.

(2) 52 Law J. Rep. Q.B. 636; Law Rep. 11 Q.B. 537.

* *Coram*, Brett. M.R., Bowen, L.J., and Fry L.J.

Hetherington v. *Groome, App.*

July 31.—FRY, L.J., read the judgment of himself and BRETT, M.R. :—

The question in the present case turns on the validity of a bill of sale made on the 29th of March, 1883, by one Ramsay to Hetherington by way of security, having regard to the Bills of Sale Act of 1882.

The bill of sale in question contained an agreement by the mortgagor that he would, upon demand in writing, pay to the mortgagee the principal sum of 74*l.* and interest; and further, that it should be lawful for the mortgagee to enter upon the premises where the assigned effects might be, and to seize and take possession thereof, and to sell the same, if the mortgagor should make default in payment of the principal and interest on demand in writing, and in certain other contingencies.

The statute of 1882, by section 7, provides that the assigned chattels shall not be seized or taken possession of by the grantee for any other than certain causes, one of which is default in payment "at the time therein"—that is, in the bill of sale—"provided for payment"; and the 9th section avoids every bill of sale given by way of security unless made in the form in the schedule to the Act; and the form thus given provides for payment by instalments on days named, adding in brackets, "or whatever else may be the stipulated times or time of payment."

Is a payment on demand a payment at a time in the bill of sale provided for or thereby stipulated? The words of the statute and the schedule are perhaps not clear—they may well include a time fixed by reference to any known event: they may perhaps include a time to be ascertained by the happening of some contingency, but they do not, in our opinion, include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale. To leave the time of payment at his unfettered choice is not, we think, within the meaning of the 7th section of the statute, to provide in the bill of sale a time for payment, or, within the meaning of the schedule, to ascertain the time by stipulation.

It is impossible not to see that the object of the statute was greatly to fetter the freedom of contract as regards such instruments as that now in question; and we think that to hold a payment on demand to be a payment at a stipulated time would be to go counter to the object and spirit of the Legislature as expressed in the Act in question.

There is, in our opinion, a further objection to this bill of sale. It gives in terms a power to enter, to seize, to take possession, and to sell, in default of payment on demand, or on the happening of certain events therein mentioned, which are the same as the events referred to in sub-sections 2, 3, 4, and 5 of section 7 of the Act of 1882. From this provision a person reading the document alone would conclude that all these powers, including the power of sale, arose forthwith on the happening of any of these contingencies. But the 13th section of the Act prohibits the sale of any chattels seized until the expiration of five clear days from the day of seizure, and no lawyer can doubt but that this provision of the Act would be to override and alter what would otherwise have been the construction of the instrument. Now the form of the bill of sale given by the Act contains no affirmative statement of the contingencies on which seizure or sale may be made, and still less any suggestion that a sale can be made immediately on seizure. The form of the bill in question which contains this false suggestion is not, in our opinion, in substantial accordance with the form in the schedule. We think that this false suggestion, though no doubt inoperative in law, is likely to mislead a man of the class by whom bills of sale are often given, and to furnish a weapon of oppression to a man of the kind by whom they are often taken. Moreover, we can find no motive whatever for the insertion in this instrument of the express power of sale, except the desire to mislead the grantor. We think that for this reason also the bill of sale is void under the 9th section of the Act of 1882.

BOWEN, L.J.—If the validity or invalidity of the bill of sale depended on all the questions which have been discussed in the judgment which has just been read, I should find it difficult to assent to that judgment, because I am inclined to think that it is too strict a construction of the

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bill of sale to read it as purporting to give the grantee the right to sell otherwise than in conformity with the provisions of section 13 of the Act of 1882. I think that reading the instrument in question broadly, while at the same time remembering that the form must not differ substantially from the form given in the schedule to the Act, I should come to the conclusion that the sale was to take place at the expiration of the time limited by the Act. But however this may be, it is not important here, because the bill of sale is bad because it gives a power to seize and sell in default of payment on demand; and though I have some hesitation, yet I am not prepared to differ from the judgment which has been delivered.

Appeal allowed.

Solicitors—T. R. Apps, for plaintiff; T. Durant, for defendant.

1884. May 26. } CUNDY *v.* LE COCQ.

Licensing Acts—"Selling Liquor to a Drunken Person"—No Indication of Insobriety—Mens rea—35 & 36 *Vict. c.* 94. *s.* 13—"*Drunken person.*"

[For the report of the above case, see 53 Law J. Rep. M.C. 125.]

1884. May 26, 27. June 24. } JENKS AND OTHERS *v.* TURPIN.

Gaming — Common Gaming House — 17 & 18 *Vict. c.* 38. *s.* 4 — *Unlawful Gaming.*

[For the report of the above case, see 53 Law J. Rep. M.C. 161.]

1884. June 23. } *In re* LASCELLES; *ex parte* GENESE.

Practice—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Appeal from Order on Debtor's Summons—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 103 *and* 104—*Jurisdiction of Bankruptcy Registrar.*

The jurisdiction of the High Court under section 5 *of the Debtors Act*, 1869, *has been, by virtue of section* 103 *of the Bankruptcy Act*, 1883, *and orders under it, assigned to the Judge in Bankruptcy, and the exercise of it delegated to the Bankruptcy Registrars. An appeal from an order of a Registrar, approved by the Judge in Bankruptcy, will therefore not lie to the Divisional Court, but will be regulated by section* 104 *of the Bankruptcy Act*, 1883.

This was an application to the Divisional Court to grant an extension of time for appealing against the refusal of Cave, J., to interfere with an order of a Registrar in Bankruptcy. Such order had been made by the Registrar upon a judgment summons under section 5 of the Debtors Act, 1869. By the Bankruptcy Act, 1883, s. 103, a judgment debtor summons is made to be bankruptcy business; and the jurisdiction under section 5 of the Debtors Act, 1869, may, by direction of the Lord Chancellor, who has accordingly issued such an order, be delegated to the Bankruptcy Registrars of the High Court.

Kisch, for the applicant.

Percy Wheeler took the objection that the Divisional Court had no power to review the order of the Registrar; this could only be done by a Court having bankruptcy jurisdiction. Before the Bankruptcy Act of 1883, it is admitted that the Divisional Court could hear the appeal —see *Chard* v. *Jervis* (1); but that Act transfers the jurisdiction from the High Court to the Bankruptcy Judge, and the appeal from him is regulated by section 104.

GROVE, J.—I am of opinion that we have no power to rescind the order of a Court having bankruptcy jurisdiction.

(1) 51 Law J. Rep. Q.B. 442; Law Rep. 9 Q.B. D. 178.

In re Lascelles; ex parte Gencse.

The mode in which an appeal is had from such Court is pointed out in section 104. But that section immediately follows on section 103, which by sub-section 2 makes it lawful for the Lord Chancellor to delegate the powers of the High Court with reference to the committal of debtors under section 5 of the Debtors Act, 1869, to the Bankruptcy Registrars. Here is an order by a Registrar in the exercise of such power; it is therefore an order of a Court having jurisdiction in bankruptcy; the appeal must therefore be according to section 104, and cannot be entertained by the Divisional Court.

HUDDLESTON, B.—I concur. It was intended that the appeal in such cases should no longer be, as before, to the High Court, but to the Bankruptcy Court. The Act of 1883 in terms takes away the jurisdiction from the High Court and assigns it to the Judge to whom bankruptcy business is assigned. The appeal from him is an appeal from a Court having jurisdiction in bankruptcy under that Act, and must be prosecuted according to section 104, which regulates such appeals.

Solicitors—Beyfus & Beyfus, for judgment creditor; Julius A. White, for judgment debtor.

1884. June 16. HUNTER *v.* JOHNSON.

Elementary Education Acts—By-laws—Detention after Hours—"Home Lessons"—Assault—33 & 34 *Vict. c.* 75. *s.* 74.

[For the report of the above case, see 53 Law J. Rep. M.C. 182.]

1884. May 22. THE GUARDIANS OF MERTHYR TYDVIL UNION (*appellants*) *v.* THE GUARDIANS OF STEPNEY UNION (*respondents*).

Poor — Settlement — Irremovability — Residence—39 & 40 *Vict. c.* 61. *s.* 34—*Mother and Son—Breach of Residence.*

[For the report of the above case, see 53 Law J. Rep. M.C. 183.]

1884. June 17, 24. July 5. THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY *v.* THE DENABY MAIN COLLIERY COMPANY.

Railway—Railway Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Grouping of Rates—Undue Preference—Action for Overcharges—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2 *and* 6.

No action can be maintained for a breach of section 2 *of the Railway and Canal Traffic Act.*

By the 90*th section of the Railway Clauses Consolidation Act*, 1845, *a railway company may alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all goods "passing over the same portion of the line of railway under the same circumstances."*

In an action brought by the plaintiffs, a railway company, against the defendants, a colliery company, the latter counter-claimed for "overcharges" under the following circumstances. It appeared that the plaintiffs charged one uniform set of rates per ton for the carriage of goods from about forty-eight different collieries to a number of specified places lying eastward of those collieries and served by the railway. The defendants' colliery was the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the one of the group further from the defendants' colliery was fifteen miles. In consequence of the "grouping" arrangements the defendants were compelled to pay the same carriage rates as other members of the group whose coals were conveyed a considerably greater distance along the plaintiffs' line of railway:—Held, *that the "group rates" were a violation of section* 90 *of the Railway Clauses Consolidation Act*, 1845 (*notwithstanding that the termini of the transit did not correspond*), *and that the defendants were therefore entitled to counter-claim for the difference between the amount actually paid*

by them for carriage of coal and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group.

Special Case stated by an arbitrator, of which the following is the material portion:—

The action was brought to recover a balance of carriage account from the defendants for coal conveyed by the plaintiffs along their railway. The defendants counter claimed for overcharges from the 14th of December, 1874, to the 14th of December, 1880, being a period of six years before the commencement of the action, and for damages.

The defendants are colliery owners, carrying on business at the Denaby Main Colliery, near Doncaster. It is the business of the defendants to raise and sell coals for delivery in different parts of the kingdom and abroad. They deal only in coals raised from their own mines. Their colliery is situated on the line of the plaintiffs' railway and connected with it by sidings. A large portion of their coal leaves their colliery by the plaintiffs' line, from which it passes either along the plaintiffs' line only, or along the plaintiffs' line and thence on to the various lines connected therewith. The defendants' colliery has no direct communication with any other line of railway except that of the plaintiffs.

During the period covered by the action the plaintiffs had one uniform set of rates for the carriage of coal from about forty-eight different collieries, enumerated in the Case, and called "the group," the rates from them to a number of specified places lying to the eastward, and served by the plaintiffs' railway, being called the "group rates." The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the member of the group furthest from the defendants' colliery is fifteen miles.

The group rates comprised the rates from each of the said collieries to a great number of towns and places in various parts of England.

All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery and go away thence in an easterly direction. All coal going away to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was despatched to the place of destination. There was no "grouping" for traffic westward. The defendants' colliery, being the furthest to the eastward of the collieries in the South Yorkshire coal-field, paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon the coal going east. The bulk of coal sent from the defendants' colliery has always gone eastward, but it has also had a substantial traffic westwards. On the 8th of June, 1880, the defendants applied to the Railway Commissioners to restrain the plaintiffs from charging the group rates, and on the 26th of July, 1880, the Railway Commissioners gave judgment in favour of the defendants, and prohibited the plaintiffs from charging equal rates of carriage between the various collieries comprising the group and the places lying to the eastward to which the group rates applied. For the purposes of the case it was admitted that the decision of the Railway Commissioners was right.

The plaintiffs have ceased to charge the group rates since the 26th of July, 1880, and have thenceforward carried coals from the various members of the group at differential rates. The rates thus established are, in respect of coal carried from the defendants' colliery, lower in every instance than the group rates.

The defendants have been charged the group rates down to the 26th of July, 1880.

For the purpose of the case it was admitted that the circumstances under which payments had been made did not preclude the defendants from opening the accounts.

The defendants contended that the group rates were a violation of section 90 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and of section 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and that they were entitled under either of these enactments to recover the difference between the amount

actually paid by them for carriage of coals, and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group; and not only such differences, but damages for breaches of the statutory duty (1).

The plaintiffs contested each of the above claims.

The questions for the opinion of the Court were:—

1. Did the group rates constitute a violation of the Railways Clauses Consolidation Act, 1845, section 90?

2. If so, are the damages of the defendants for the breach of that enactment limited to the amount of the overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

3. Does an action lie for breach of the Railway and Canal Traffic Act, 1854, section 2?

4. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered (2)?

Webster, Q.C., *Forbes, Q.C.*, and *Lofthouse* appeared for the plaintiffs.

The Solicitor-General (*Sir F. Herschell*), *Littler, Q.C.*, and *C. A. Russell*, were for the defendants.

The following cases were cited:—*Evershed* v. *The London and North Western Railway Company* (3), *The Great Western Railway Company* v. *Sutton* (4), and *In re Ransome and The Eastern Counties Railway Company* (5).

Cur. adv. vult.

The judgment of the Court (6) was delivered, on July 5, by

MATHEW, J.—With reference to the question put to us as to whether the group rates constituted a breach of the Railways Clauses Consolidation Act, 1845, s. 90, our answer to that question is that we think the group rates were a violation of section 90, and that the overcharge may be recovered in accordance with *Evershed's Case* (3). We are unable to adopt the narrow construction of section 90 contended for by the plaintiffs' counsel—namely, that the section in question only applies where the termini of the transit correspond. In the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there would appear to be that kind of inequality that section 90 is intended to

(1) The Railways Clauses Consolidation Act, 1845, section 90, permits railway companies, "from time to time, to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portion of the railway, as they shall think fit, provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

By the Railway and Canal Traffic Act, 1854, section 2, "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, or other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue and unreasonable prejudice or disadvantage in any respect whatsoever."

By section 6, "No proceeding shall be taken for any violation or contravention of the above enactment, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal, or railway and canal, company under the existing law."

(2) A portion of the Special Case, as well as of the judgment of the Court relating to the plaintiffs' claim against the defendants, do not call for a report, and have accordingly been omitted.

(3) 48 Law J. Rep. Q.B. 22; Law Rep. 3 App. Cas. 1029.

(4) 38 Law J. Rep. Exch. 177; Law Rep 4 H.L. 226.

(5) 4 Com. B. Rep. N.S. 135; 27 Law J. Rep C.P. 166.

(6) Mathew, J., and Day, J.

prevent. In such cases part of the services to the particular customer would be practically rendered gratuitously, to the disadvantage of others. Our answer therefore is that section 90 applies.

Then we are further asked, whether, if section 90 applies, the damages of the defendants for the breach of that section are to be limited to the amount of the overcharges, and what is the measure of such overcharges, and whether general damages can also be recovered. To that we answer that, with respect to the question whether general damages can be recovered in addition to the overcharges, we see no ground in the statement of facts before us upon which an action for damages would be recoverable.

Then the third question is, does an action lie for breach of the Railway and Canal Traffic Act, 1854, section 2? With reference to that, we are of opinion that an action does not lie for any contravention of the Act of 1854. Section 6 seems conclusive upon this question. The terms of section 6 are: "No proceeding shall be taken for any violation or contravention of the above enactment except in the manner herein provided; but nothing herein contained shall take away or diminish any right, remedy, or privilege of any person or company against any railway company under the existing law." The question put to us is whether an action brought to recover overcharges—overcharges having regard to section 2 of the statute—will lie or not; and the ingenious suggestion was made in argument that an action in respect of such overcharges was not an action for anything done in contravention of the statute, because the action was brought for the detention of the money. But the money would be perfectly properly charged if it were not for the prohibition contained in the Act. It is therefore perfectly clear that in substance the action is brought for something done in contravention of the Act.

We were much pressed with the decision in *Evershed's Case* (3), which was treated as a decision that an action would lie under section 2 of the Railway and Canal Traffic Act. With reference to that case we only say that, whatever the language in some of the judgments may be, the point was not presented to the Court, and no opinion was expressed upon it. The judgment in *Evershed's Case* (3) was that section 90 of the Railways Clauses Consolidation Act, 1845, had been infringed, and that for the violation of that statute an action would lie. The decision in that case therefore in no way affects the conclusion at which we have arrived, namely, that an action will not lie in respect of a complaint based on the Act of 1854.

Judgment accordingly.

Solicitors—Cunliffe, Beaumont & Davenport, agents for R. B. M. Lingard-Monk, Manchester, for plaintiffs; Indermaur & Co., agents for F. W. Fisher, Doncaster, for defendants.

1884. Feb. 22. March 8. THE PARIS AND NEW YORK TELEGRAPH COMPANY *v.* THE PENZANCE UNION.

Poor—Rate—Telegraph Wires—Exclusive Occupation—43 Eliz. c. 2.

[For the report of the above case, see 53 Law J. Rep. M.C. 189.]

1884. July 2, 3. THE LANCASHIRE AND CHESHIRE TELEPHONE EXCHANGE COMPANY (LIMITED) *v.* THE OVERSEERS OF THE TOWNSHIP OF MANCHESTER.

Poor — Rate — Telephone Company — Rateability of Wires—Occupation—Licence.

[For the report of the above case, see 53 Law J. Rep. M.C. 195.]

[IN THE COURT OF APPEAL.]

1884. Aug. 7.

BAILEY *v.* BAILEY.*

Practice — Alimony — Arrears of, not recoverable by Action—20 & 21 *Vict. c.* 85. *ss.* 32 *and* 52.

The power to order payment of alimony pendente lite is exercised by the Judge of the Probate, Divorce, and Admiralty Division by virtue of the Matrimonial Causes Act, 1857, *and section* 52 *of that Act provides that the orders of the Court shall be enforced in the same manner as the orders of the High Court of Chancery "may be now enforced":*—Held, *that, inasmuch as an action to enforce an order of the Court of Chancery could not have been maintained at the date of the commencement of the Act, a wife to whom payment of alimony has been ordered cannot sue in the Queen's Bench Division to recover arrears of alimony.*

Appeal from a decision of the Divisional Court.

The action was brought by the plaintiff, who is the petitioner in a suit in the Probate, Divorce, and Admiralty Division, to recover 66*l.* 4*s.* from her husband, arrears of alimony *pendente lite*, which she alleged to be due to her under an order of the Court made in the divorce suit. The writ was specially indorsed under Order III. rule 6. A Master having refused to give leave to the plaintiff to sign final judgment under Order XIV., she appealed to the Judge in chambers, by whom the matter was referred to the Court.

The Divisional Court (Grove, J., and Huddleston, B.) affirmed the decision of the Master, being of opinion that an order for payment of alimony *pendente lite* is not like a final judgment determining once and for all the rights of the parties, and that therefore the plaintiff's claim was not for "a debt or liquidated demand in money" within the meaning of Order III. rule 6.

The plaintiff appealed.

Morton Smith, for the appellant.—The order created a debt arising out of the defendant's implied contract to pay the alimony in compliance with the legal obligation imposed by that order. Rule 6 of Order III. is substantially the same as section 25 of the Common Law Procedure Act, 1852 (1)—*Grant* v. *Easton* (2); the decision, therefore, of the Exchequer Chamber in *Hodsoll* v. *Baxter* (3), where it was held that a judgment debt might be indorsed under section 25, ought to be treated as a decision on Order III. rule 6. It is true that in the present case the action is brought upon an order of the Probate, Divorce, and Admiralty Division; but in *Hutchinson* v. *Gillespie* (4) it was held that an action would lie upon an order of the Judicial Committee of the Privy Council for payment of costs.

[BRETT, M.R.—The question is, whether an action will lie at all upon this order, for section 52 of the Matrimonial Causes Act, 1857 (5), says that such orders are to be enforced in the manner in which the orders of the High Court of Chancery "may be now enforced." At that time an action would not lie upon an order in equity, although possibly it might now under the Judicature Acts.]

Henderson v. *Henderson* (6) was also cited.

Wildey Wright, for the respondent, was not called on.

BRETT, M.R.—I am of opinion that this appeal must be dismissed, upon the short ground that an order for judgment under Order XIV. cannot be made in respect of these arrears of alimony, because an action does not lie at all to enforce an order of the Probate, Divorce, and Admiralty Division for the payment of alimony. The well-known rule applicable to the

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

(1) 15 & 16 Vict. c. 76.

(2) *Ante*, p. 68; Law Rep. 13 Q.B. D. 302.

(3) E. B. & E. 884; 28 Law J. Rep. Q.B. 61.

(4) 11 Exch. Rep. 798; 25 Law J. Rep. Exch. 103.

(5) 20 & 21 Vict. c. 85. s. 52, provides that "all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

(6) 6 Q.B. Rep. 288; 13 Law J. Rep. Q.B. 274.

Bailey v. *Bailey, App.*

construction of statutes is that where a statute confers a right which does not exist at common law, and also provides a remedy by means of which that right may be enforced, then that remedy is the only one which can be adopted, and an action will not lie. Now here the power to order payment of alimony was conferred upon the Divorce Court—which was itself a creature of the statute—by section 32 of the Matrimonial Causes Act, 1857. It is clear, therefore, that the right to alimony did not exist at common law. Then section 52 of that Act provided the means of enforcing payment—not, indeed, in direct terms, but by implication. That section must therefore be construed as if all existing remedies then given by the High Court of Chancery were written into the section. But at that time an action did not lie upon a decree or order of the Court of Chancery. At common law it was always held that an action would lie as upon an implied contract to recover a sum of money found to be due to a person on a judgment; but it is a matter of historical knowledge that this rule did not apply in the Court of Chancery. That being so, the remedy by action to enforce an order of the Court did not exist in Chancery; and it necessarily follows that it is not one of the remedies given by section 52 of the Act of 1857.

BOWEN, L.J., and FRY, L.J., concurred.

Appeal dismissed.

Solicitors—P. K. Langdale, for plaintiff; J. C. Scard, for defendant.

1884. May 20, 27. WILLIAMS (*appellant*) *v.* THE WANDSWORTH BOARD OF WORKS (*respondents*).

Metropolis Management Act, 1855 (18 *& 19 Vict. c.* 120), *s.* 250—"*Owner*"—*Metropolis Management Amendment Act*, 1862 (25 *& 26 Vict. c.* 102), *s.* 77—"*Owner of Land abutting on*" *New Street*—*Liability to contribute to Expenses of Paving*—*Owner of Strip a few inches wide bound to maintain Fence.*

[For the report of the above case, see 53 Law J. Rep. M.C. 187.]

1884. March 25. THE MAYOR ETC. OF OVER DARWEN *v.* THE JUSTICES OF LANCASTER.

Highway—*Main Road*—*Repair*—*Costs of Maintenance*—*Contribution*—"*County authority of the County in which such Road is situated*"—*Highway Act*, 1862 (25 *& 26 Vict. c.* 61), *s.* 2—*Highways* (*Amendment*) *Act*, 1878 (41 *& 42 Vict. c.* 77), *ss.* 13 *and* 38.

[For the report of the above case, see 53 Law J. Rep. M.C. 198.]

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TO THE SUBJECTS OF THE CASES

IN

THE QUEEN'S BENCH DIVISION

OF

The High Court of Justice,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

LAW JOURNAL REPORTS, VOL. LIII.

[In the following Index (M.C.) denotes that the case is reported in the Magistrates' Cases Volume.]

Action—*negligence: damages: distinct causes of action: injury to cab: subsequent action for personal injuries: effect of previous proceedings*]—The plaintiff brought an action and recovered damages in the County Court against the defendant in respect of injuries caused to his cab by the negligence of the defendant's servant. The plaintiff subsequently brought an action in the High Court to recover damages for personal injuries arising out of the same act of negligence but which did not develop until after the earlier action had been brought:—*Held* (*per* BRETT, M.R., and BOWEN, L.J.; LORD COLERIDGE, C.J., *dissentiente*), that the plaintiff was entitled to recover, inasmuch as the cause of action with regard to the cab arose at the time of the accident, whilst the cause of action with regard to the personal injuries to the plaintiff arose when he found that he had been seriously hurt, and consequently the causes of action were not the same but two distinct causes of action. *Brunsden* v. *Humphrey* (App.), 476

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—— **on Statute.** See SCHOOL BOARD.

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Arbitration—*contract containing provision for: appointment of arbitrator by one party: refusal to appoint by the other: revocation of authority: common law procedure act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 13]—Where a reference is made to two arbitrators, one to be appointed by each party, and one party fails to appoint an arbitrator, the other party may, by section 13 of the Common Law Pro-

Arbitration (continued)—

cedure Act, 1854, after notice, appoint the arbitrator nominated by him to be sole arbitrator in the reference; but that section does not prevent the party who has failed to appoint from revoking the authority of such sole arbitrator, and from withdrawing from the reference before the award is made, for the sole arbitrator becomes in such a case the mandatory of both parties, and either can within the proper time revoke his authority. *Fraser & Co.* v. *Ehrensperger* (App.), 73

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Attachment of Debts — *police superannuation allowance: 11 & 12 Vict. c. 14: instalments of pension: order XLV. rule 2: debt owing or accruing*]—Where, under 11 & 12 Vict. c. 14, a retired police constable had become entitled to be paid by the corporation of a borough a superannuation allowance by quarterly payments,—*Held*, that a quarter's allowance, when actually due, was a debt owing and accruing to him by the corporation, and attachable in their hands on the application of the judgment creditor under Order XLV. rule 2. *Booth* v. *Trail. The Mayor and Corporation of Sunderland* (*garnishees*), 24

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Banker—*right to issue bank notes: banker lawfully issuing notes on May 6, 1844: transfer of business: reservation as to right of issue: bank charter act*, 1844 (7 & 8 *Vict. c.* 32), *ss.* 11, 12 *and* 28]—A firm of bankers lawfully issuing notes on the 6th of May, 1844, and accordingly permitted by 7 & 8 Vict. c. 32 (the Bank Charter Act, 1844), under certain conditions, to continue so to do, sold their business to a limited company, "excepting their right to issue notes, but including agreed benefit of the issue"; and it was agreed that they might continue to issue their notes, but through the company's officers only, that the company should allow them interest on the circulation at two per cent. less expenses, that to continue the issue new partners might be admitted, but not without the company's consent, that if their right of issue were taken away any compensation given them should go to the company unless it should get an equal right of issue, and that if it should acquire a right of issue their right of issue was to cease. The firm ceased to carry on business except under that agreement:—*Held*, that their notes could no longer be lawfully issued, whether under the agreement or otherwise, as the agreement amounted to a transfer of their right of issuing notes, as well as of the rest of their business, and they had therefore, within the meaning of sections 12 and 28 of the Act, ceased to "carry on the business of a banker, whether by the issue of notes or otherwise," and so were prohibited from thereafter issuing notes. *The Attorney-General* v. *Birkbeck, Stansfeld, Alcock, and the Craven Bank* (*Lim.*), 378

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—— *costs: scheme of arrangement: meeting of creditors: attendance of solicitor: bankruptcy act*, 1883, *s.* 105: *"costs of and incidental to any proceeding in court": bankruptcy rules*, 1883, *rule* 100]—A County Court Judge, sitting in Bankruptcy, allowed out of the debtor's estate the costs of the attendance of the petitioning debtor's solicitor at a meeting of creditors for confirming a scheme of arrangement of the debtor's affairs:—*Held*, that those costs could not be allowed, not being "costs of or incidental to any proceeding in Court" within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105. *In re Strand; ex parte The Board of Trade*, 563

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—— *jurisdiction: questions arising between third parties: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-s.* 1]—The Court of Bankruptcy has no jurisdiction to entertain personal claims between third parties, or claims to property as between third parties, the trustee not claiming any interest in the property in dispute, although the decision of such question may also decide which of such third parties shall prove against the bankrupt's estate. *In re Lowenthal; ex parte Beesty*, 524

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Halliday v. *Harris* (43 Law J. Rep. C.P. 350; Law Rep. 9 C.P. 668) explained. Ibid.

—— *jurisdiction to rescind receiving order: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104]—There is jurisdiction to rescind a receiving order under section 104 of the Bankruptcy Act, 1883, whereby "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." *Ex parte Wemyss; in re Wemyss*, 496

—— *practice: bankruptcy rules*, 1883, *rules* 65–69: *rules* 1870, *rules* 78–81: *equitable mortgagee, application by, for sale: conduct of sale: costs of trustee: discretion of court*] —Where an equitable mortgagee of property of a liquidating debtor applies to the Court for an order for sale, it is wholly in the discretion of the Court to whom the conduct of such sale is given. If the security be insufficient to satisfy the mortgage debt, the conduct of the sale will properly be given to the mortgagee; otherwise to the trustee. The Court has also discretion as to allowing the trustee his costs occasioned by such application. In all cases where the trustee properly incurs expense in relation to such application or sale, the same when sanctioned by the Court will be constituted a first charge on the proceeds of the sale. *In re Jordan; ex parte Harrison*, 554

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—— *building agreement: bills of sale act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4; *amendment act*, 1882 (45 & 46 *Vict. c.* 43]—A building agreement provided that all building and other materials brought upon the land by the builder, the intended lessee, should, whether affixed to the freehold or not, become the property of the owner of the land, the intended lessor:—*Held*, affirming the judgment of the Queen's Bench Division, that this agreement was not a bill of sale within the Bills of Sale Act, 1878. *Reeves* v. *Barlow* (App.), 192

—— *consideration: advance of* 30*l.*, *with immediate repayment of* 15*l.*: *bills of sale* (1878) *amendment act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 12]—The plaintiff applied to the defendant for a loan of 15*l.*, offering as security a bill of sale on his furniture. The defendant pointed out that by section 12 of the Bills of Sale Act, 1882, the bill of sale would be void if given for a consideration under 30*l.*, and proposed to lend that amount, with a stipulation that 15*l.* should be repaid on demand and 15*l.* by instalments. The plaintiff agreed to the terms of the loan, and, on the execution of a bill of sale in accordance therewith, received the sum of 30*l.* Immediately after the plaintiff had received the 30*l.* the defendant, at the suggestion of the plaintiff, demanded repayment of the 15*l.*, which the plaintiff accordingly then paid:—*Held*, in the absence of evidence, that the transaction was a sham, that the bill of sale was valid. *Davis* v. *Usher*, 422

—— *form of: several grantees: consolidation of debts: payment on demand: bills of sale act* (1878) *amendment act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7 *and* 9]—A bill of sale was

Bill of Sale (continued)—

given to secure payment of several sums of money due to and advanced by five separate parties, and amongst other covenants contained separate covenants with four of the parties to pay on demand the sums due to each, with a declaration that if default should be made in payment of any sum or sums of money thereby secured, or if any other default or event mentioned as a cause of seizure in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882, should happen, it should be lawful for the mortgagees to enter, seize, and sell the property:—*Held*, that the bill of sale was a substantial alteration of the form in the schedule to the Act, and therefore in contravention of section 9, and void, even assuming it to contain no stipulations inconsistent with the other provisions of the Act. *Melville* v. *Stringer*. (*Houghton and others, claimants.*) (App.), 482

Judgment of the Queen's Bench Division (reported *ante*, p. 175) reversed. Ibid.]

—— *schedule: specific description of goods in: bills of sale amendment act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4 *and* 9; *accordance of bill of sale with form in schedule of act*]—The Bills of Sale Amendment Act, 1882, enacts by section 4 that every bill of sale shall have annexed thereto a schedule containing an inventory of the personal chattels comprised therein; that such bill of sale shall have effect only in respect of the chattels specifically described in the schedule, and shall be void except as against the grantor in respect of any personal chattels not so specifically described:—*Held*, that a schedule to a bill of sale which contained the description "Household furniture and effects, implements of husbandry," was insufficient to convey the goods so described, for that the schedule must contain such an inventory as is usual in business, separating the classes of articles comprised in it one from the other, although it need not contain a detailed description of each article. *Roberts* v. *Roberts* (App.), 313

—— *seizure in default of payment on demand: power of sale: bills of sale act* (1878) *amendment act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and* 13]—A bill of sale, made after the passing of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), contained an agreement by the mortgagor that he would, upon demand in writing, pay to the mortgagee the principal sum and interest; that it should be lawful for the mortgagee to enter upon the premises where the assigned effects might be, to seize and sell the same, if the mortgagor should make default in payment on such demand being made, or if any of the contingencies mentioned in section 7, sub-section 2, 3, 4, and 5 of the Act, should happen; and provided that the effects assigned should not be liable to seizure for any cause other than those specified in section 7 of the Act of 1882:—*Held*, that the bill of sale was void, because it gave a power to seize in default of payment on demand, and not, as required by section 7 and the schedule of the Act, at a time therein provided or stipulated for payment. *Held*, further, by BRETT, M.R., and FRY, L.J., that the bill of sale was void under sections 9 and 13 of the Act, because the power of sale therein contained arose forthwith on the happening of any of the contingencies mentioned, and was not limited to the expiration of five clear days from the day of seizure, as required by section 13 of the Act of 1882. *Hetherington* v. *Groome* (App.), 576

—— 45 & 46 *Vict. c.* 43. *ss.* 7 *and* 9, *and schedule: accordance with form: agreement for maintaining security: production of receipts for insurance: power to seize chattels*]—A bill of sale, given to secure a debt of the grantor, contained a covenant by the grantor to insure and keep insured the chattels assigned in a sum equal to the sum secured, and forthwith after every payment of premiums produce and, if required, deliver to the grantee the receipt, and a clause empowering the grantee, subject to the Bills of Sale Act of 1882, to seize the chattels on breach:—*Held*, that the bill of sale was not void under the Act of 1882, s. 9. *Hammond* v. *Hocking* (*Illingworth claimant*), 205

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Building Society—*mortgage: arbitration: building societies act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 16, *sub-s.* 9, *ss.* 34, 35 *and* 36: *jurisdiction of high court*]—A building society formed under the Building Societies Act, 1874, and having in accordance with section 16, subsection 9, a rule requiring all disputes between itself and its members to be settled by arbitration, sued an advanced member upon covenants contained in a mortgage. On a summons taken out by the member to stay proceedings,—*Held* (by LORD BLACKBURN and LORD WATSON; *dissentiente* the EARL OF SELBORNE, L.C.), that the jurisdiction of the Court was ousted, and that the matter must be referred to arbitration under the rule. *The Municipal Permanent Investment Building Society* v. *Kent* (H.L.), 290

—— *mortgage: statutory receipt:* 6 & 7 *Will.* 4. *c.* 32. *s.* 5: *third mortgage: tacking: vendor and purchaser act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 7: *land transfer act*, 1875 (38 & 39 *Vict. c.* 87)]—In 1865, L., a member of a building society established under 6 & 7 Will. 4. c. 32, mortgaged certain premises to the society to

Building Society (continued)—

secure all moneys to become due from him under its rules. In 1868, by a deed reciting the first mortgage, L. mortgaged his interest in the premises to the plaintiff. The first mortgagees received no notice of the second mortgage. In 1875, in pursuance of a previous arrangement with L., the appellants paid off the first mortgage, whereupon the trustees of the society handed to them the title-deeds, and also the first mortgage-deed indorsed with a receipt, pursuant to 6 & 7 Will. 4. c. 32. s. 5, and antedated to the date of the arrangement. The appellants, who had no notice of the second mortgage, also made a further advance to L., whereupon he assigned the premises to them to secure the whole sum so paid to him and to the first mortgagees. All three mortgages were duly registered in the North Riding registry in order of date. L. filed a petition for liquidation:—*Held*, that the appellants were entitled to priority over the plaintiff in respect of the sum paid to the first mortgagees, but not in respect of the further advance to L. *Robinson* v. *Trevor* (App.), 85

Pease v. *Jackson* (37 Law J. Rep. Chanc. 725; Law Rep. 3 Chanc. 576) followed. Ibid.

The Fourth City Mutual Benefit Building Society v. *Williams* (49 Law J. Rep. Chanc. 245; Law Rep. 14 Ch. D. 140) considered *per* BAGGALLAY, L.J. Ibid.

Burial—*ecclesiastical district part of a parish having a burial ground and board: district having separate burial ground: power of to appoint a separate board:* 18 & 19 *Vict. c.* 128. *s.* 12]—An ecclesiastical district, not separately maintaining its own poor but having a separate burial ground, which forms part of an old parish separately maintaining its own poor and having a burial board and ground, can, under 18 & 19 Vict. c. 128. s. 12, appoint a separate burial board for such district, although it forms part of an area for which a burial board already exists. *Reg.* v. *The Overseers of the Parish of Tonbridge* (App.), 488

Judgment of the Queen's Bench Division reversed. Ibid.

Burial Board. See REVENUE.

Carrier. See RAILWAY COMPANY; SHIP AND SHIPPING.

Cesser Clause. See CHARTER-PARTY.

Chambers, Business at. See PRACTICE.

—— **Judge at.** See PRACTICE.

Charging Order. See PRACTICE; SOLICITOR AND CLIENT.

Charity. See REVENUE.

Charter-party—*bill of lading: incorporation of terms of charter-party: cesser clause: demurrage: port of discharge*]—Goods were shipped on board the plaintiff's ship under two bills of lading, by which they were made deliverable at the port of discharge to the defendants or their assigns, "they paying freight and all other conditions as per charter-party." The charter-party, which was entered into by the defendants as charterers for account of another party, stipulated for payment of freight and demurrage, and also that the liability of the defendants as charterers should cease as soon as the cargo was on board, the vessel holding a lien upon the cargo for freight and demurrage. In an action against the defendants, as consignees of the goods, for demurrage incurred at the port of discharge,—*Held*, that as the cesser clause in the charter-party was inconsistent with the contract contained in the bill of lading, it could not be incorporated into the bill of lading, and, consequently, that the defendants as consignees were not absolved from liability for demurrage incurred at the port of discharge. *Gullichsen* v. *Stewart Brothers* (App.), 173

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 648) affirmed. Ibid.

—— See SHIP AND SHIPPING.

Chose in Action—*assignment: action by assignee: notice after death of assignor: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6]—Under sub-section 6 of section 25 of the Judicature Act, 1873, the assignee, by a voluntary assignment, of "all moneys now or hereafter standing to the credit" of the assignor at a bank, may recover from the bank the balance of a current account due to the assignor at his death, and notice of the assignment may be duly given to the bank after the death of the assignor. *Walker* v. *The Bradford Old Bank* (*Lim.*), 280

—— See DEBTOR AND CREDITOR; SOLICITOR.

Church—*benefice: advowson: refusal by bishop to institute presentee: unfitness: past offences against ritual*]—A bishop refused to institute to a benefice a presentee who, as a curate, habitually offended against the law in matters of ritual, and who would not promise not to repeat the acts whereby he offended:—*Held*, that such a presentee might be refused. *Heywood, Sir T. P.*, v. *The Bishop of Manchester*, 196

Church and Clergy. See RENT-CHARGE.

Common, Right of. See VENDOR AND PURCHASER.

Commons, House of. See PARLIAMENT.

Company—*companies act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 4: *association "formed after commencement of the act": partnership*] — An association, consisting of more than twenty persons, instituted in 1861, but having new members from time to time down to the present, is not an association "formed after the commencement of the Act" within the meaning of the Companies Act, 1862, and therefore does not require registration. *Shaw* v. *Simmons*, 29

—— *companies clauses consolidation act*, 1845 (8 *Vict. c.* 16), *s.* 108: *power to auditors to employ accountants: employment by one of co-auditors*] — One of co-auditors of a company incorporated by a special Act employed an accountant to assist in auditing accounts of the company, and sought to recover from the company, under the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), s. 108, the expense of so doing:—*Held*, that he was entitled to recover, notwithstanding the non-concurrence of his co-auditor. *Steele* v. *The Sutton Gas Co.*, 207

—— *directors, personal liability of: bill of exchange: false representation of authority to accept*]—The defendants, two directors and the secretary of an incorporated limited company which had no power to accept bills, at the request of their engineer and in accordance with a resolution that the company should accept his draft on account of professional services, gave to the engineer an acceptance in the following terms:—"Accepted payable at . . . . for and on behalf of the tramway company—G. K., S. F. P. (directors), B. W. (secretary)." When giving the acceptance the directors told the engineer that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills; and the engineer, on pressing them for the acceptance, told them that he could raise money on it from his father-in-law. The engineer indorsed the bill to the plaintiffs for value, and without notice to them of the understanding between him and the defendants. The bill was dishonoured, and the defendants were sued by the holders:—*Held*, that the defendants were personally liable, as by accepting the bill and putting it within the power of the drawer to negotiate it, they represented that they had authority to accept, and such representation being false in fact would therefore support an action. *The West London Commercial Bank* v. *Kitson* (App.), 345
Judgment of the Queen's Bench Division (*ante*, p. 218) affirmed. Ibid.

—— *liability of company on forged certificate of registry of shares: fraud of secretary in ordinary course of his duties: estoppel: principal and agent: scope of employment*]—G. having, through plaintiff as his broker, purchased 200 shares in the defendant company, had a transfer and apparently regularly issued certificates sent to him in ordinary course. The transfer and certificates were lodged at the company's office with a request for registration, and what purported to be a certificate that G. was the registered proprietor of 200 shares was issued to him, signed by one director and the secretary, and bearing the seal of the company. The form of this certificate was in accordance with the company's deed and resolutions, but, in fact, the name of the director was forged by the secretary. Subsequently G. deposited the certificate, as security for advances, with the plaintiff, who gave the company notice of such deposit, neither G. nor the plaintiff having any knowledge or ground for suspicion that the certificate was not genuine. On Case stated raising the question whether the plaintiff had a good title to the shares as against the company,—*Held*, that he had: the company were liable for the fraud of their agent perpetrated in the ordinary course of his employment, and they had here placed the secretary in a position to warrant the genuineness of the signature and the seal. *Shaw* v. *The Port Phillip Colonial Gold-Mining Co.* (*Lim.*), 369

—— *limited by guarantee: mutual insurance association: limitation of liability of members: members having twofold liability: companies act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 9 *and* 38]—A mutual marine insurance association was incorporated under the Companies Act, 1862, as an association limited by guarantee. The memorandum of association declared that every member undertook to contribute to the assets of the association, in the event of its being wound up, a sum not exceeding 5*l.* for the payment of the debts and liabilities of the association, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves. The defendant entered his ship to be insured in the association, and by the rules of the association he, by so doing, also became an insurer of the ships of other members of the association who entered their ships in the same class. While the defendant continued to be a member the association was wound up. In an action brought, pursuant to the rules of the association, to recover from the defendant a sum of 35*l.* as contribution towards losses incurred by other members insured in the same class as that in which he had entered his ship, the defendant contended that his liability was limited by the memorandum of association to a sum of 5*l.*: —*Held*, that the limit of 5*l.* only applied to the liabilities incurred by the defendant as a member of the association to the association, and that his liability as an insurer towards the other members of the association

Company (continued)—

who entered their ships in the association was not limited to that amount. *The Lion Mutual Marine Insur. Assoc.* v. *Tucker* (App.), 185

—— See CONTRACT; PRACTICE.

Compensation. See LANDS CLAUSES ACT.

Conflict of Law. See CONTRACT.

Consideration. See BILL OF SALE; PROMISSORY NOTE.

Conspiracy—indictment against two defendants: conviction of one defendant only: practice: misdirection: setting aside verdict. *Reg.* v. *Manning* (M.C. 85), 466

Contagious Diseases (Animals) Act (41 & 42 Vict. c. 74): prohibited district: "causing the movement" of animals: railway company: order in council: regulation of local authority. *The Midland Railway Company* v. *Freeman* (M.C. 79), 316

Contempt of Court. See COUNTY COURT.

Contract—*construction of: non-performance: force majeure: part performance abroad: conflict of law: French civil code*]—By a contract made in London between the plaintiffs and the defendants, both of whom carried on business in the city of London, the defendants agreed to sell to the plaintiffs 20,000 tons of esparto, to be shipped from Algeria by monthly shipments, on ships to be provided by the plaintiffs; payment was to be made by cash on arrival of the ships at their port of destination; the goods were to be approved by the plaintiffs or their agents at the manufactory before being baled, and if necessary were to be warehoused at the port of loading at the plaintiffs' risk; also any disputes arising were to be settled by arbitration, and this clause was to be made a rule of the High Court on the application of either party. In an action to recover damages for non-performance of the contract, the defendants pleaded that in consequence of an insurrection in Algeria and the military operations connected therewith, they were unable to perform their contract, and that by the French Civil Code which prevailed throughout Algeria *force majeure* was an excuse for non-performance of the contract:—*Held*, upon demurrer, that, in the absence of any intention either express or implied on the part of the contracting parties that the French Civil Code should be applied to the contract, it must be construed according to English and not French law; so that the defence of *force majeure* was no answer to the action. *Jacobs, Marcus & Co.* v. *The Credit Lyonnais London Agency* (App.), 156

—— *monthly delivery of goods: non-payment for one delivery: repudiation of contract by seller: winding up: right to set off unliquidated damages: judicature act*, 1875, *s.* 10]—By a contract made between the plaintiffs, a limited company, and the defendants, the defendants agreed to purchase a quantity of steel, which the company were to deliver by monthly instalments commencing in January, 1881. The company delivered part of the first instalment in January, 1881, but before the time for payment a petition was presented for winding up the company. On the 9th of February, after the time for payment had expired, the defendants being advised that they could not, pending the hearing of the petition, pay the company, wrote to suggest that an order of the Court might be obtained authorising the contract to be carried out and payments made for deliveries under it. On the 10th of February the company replied that they should consider the refusal to pay as a breach of contract releasing them from any further obligations. The defendants replied on the 12th, repeating their suggestion and urging that the delay in payment was no justification for treating the contract as at an end. On the 15th an order was made to wind up the company. On the 17th, the defendants' solicitor wrote to the liquidator claiming damages for the failure to deliver the January instalment, but offering to pay for deliveries without deduction, on the liquidator's consenting, with the authority of the Court, to keep the payments to a separate account, and that they should be made without prejudice to the defendants' claim to deduct the damages. He added that he thought it probable the defendants would consent to accept delivery then and waive the damages. The liquidator made no further deliveries and brought an action for the price of the steel delivered:—*Held*, first, that the payment for one instalment was not a condition precedent to the delivery of the rest; secondly, that the conduct of the defendants had not been such as to release the company from the contract, as they had not shewn any intention to renounce or refuse absolutely to perform it on their side, and the delay in payment was not a breach going to the root of the contract. *Held* also, that section 10 of the Judicature Act, 1875, made the rule in bankruptcy as to mutual credits and set-off applicable to winding up, and that the defendants were entitled to set off against the payments due from them for deliveries damages for the company's breach of contract. *The Mersey Steel and Iron Co.* (*Lim.*) v. *Naylor, Benzon & Co.* (H.L.), 497

—— See PRINCIPAL AND AGENT.

—— **Action for.** See PRACTICE.

Contribution. See PRACTICE; RENT-CHARGE.

Contributory Negligence. See NEGLIGENCE.

Conveyance. See VENDOR AND PURCHASER.

Copyright—*piracy: dramatic piece: right to sole liberty of representing: infringement of: performance not for profit at a hospital: place of dramatic entertainment:* 3 *&* 4 *Will.* 4. *c.* 15. *ss.* 1 *and* 2]—The plaintiff, the assignee of the sole liberty of representing a dramatic piece, sought, under 3 & 4 Will. 4. c. 15, to recover damages or penalties from the defendant, who, as one of an amateur club, had with others given three representations of the piece at a hospital before the nurses, medical officers and attendants of the hospital. Friends of the actors were admitted to one of the representations, tickets in blank being issued free of charge, some of which were sent to editors of theatrical newspapers, one of whom sent a reporter to attend one of the representations:—*Held*, affirming the judgment of the Queen's Bench Division (p. 97), by BRETT, M.R., and BOWEN, L.J., *dissentiente* FRY, L.J., that the defendant had not infringed the provisions of the statute 3 & 4 Will. 4. c. 15, for that the performance was a domestic and not a public performance. *Duck* v. *Bates* (App.), 338

—— *register: rectification:* 5 *&* 6 *Vict. c.* 45. *s.* 14*: person deeming himself "aggrieved" by any entry: person prejudiced by his own entry*]—Under 5 & 6 Vict. c. 45. s. 14, which gives power to make an order to vary an entry in the register of copyright under that Act upon the application of any person who "shall deem himself aggrieved by any" such "entry," the Court made an order varying an entry in a register of copyright upon the application of the person who had caused the entry to be made. *Ex parte Poulton & Son*; *in re the Copyright Acts*, 5 *&* 6 *Vict. c.* 45, *and* 25 *&* 26 *Vict. c.* 68, 320

Corporation. See REVENUE.

Costs. See BANKRUPTCY; LANDS CLAUSES ACT; PRACTICE; SOLICITOR.

Counterclaim. See PRACTICE.

County Courts—*admiralty jurisdiction acts*, 1868 *and* 1869*: ordinary cause within additional jurisdiction: jurisdiction of ordinary county court therein*]—The Judge of a County Court which was not appointed to have Admiralty jurisdiction, and was within the district of a County Court so appointed, refused to try a case on the ground that it was one which an Admiralty County Court had by the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), jurisdiction to try, and that the principal Act 31 & 32 Vict. c. 71 and that Act, therefore, took it out of his ordinary jurisdiction:—*Held*, that he was wrong. *Reg.* v. *The Judge of the County Court of Essex holden at Southend. In re Perfect* v. *Poynter*, 423

—— *admiralty jurisdiction:* 32 *&* 33 *Vict. c.* 51. *s.* 2*: "the carriage of goods in any ship"*]—A claim for the loss of the luggage of a passenger on board a ship is not a claim "in relation to the carriage of goods in any ship" within the County Courts Admiralty Jurisdiction Act, 1869, and there is no jurisdiction to try it conferred by that Act. *Reg.* v. *The Judge of the City of London Court*, 28

—— *judge sitting in bankruptcy: jurisdiction to commit for contempt: non-obedience to order to attend as witness: bankruptcy act*, 1869, *ss.* 66 *and* 96]—A County Court Judge sitting in bankruptcy has power under section 66 of the Bankruptcy Act, 1869, to commit a person to prison for contempt for disobedience to an order made under section 96 directing him to attend before the Court and give information in respect of a bankrupt's estate. *Reg.* v. *The Judge of the County Court at Croydon* (App.), 545

—— See PRACTICE.

County Vote. See PARLIAMENT.

Corporation. See MUNICIPAL ELECTION.

Covenant. See HUSBAND AND WIFE; LANDLORD AND TENANT.

Coverture. See HUSBAND AND WIFE.

Cremation—dead body: misdemeanour: nuisance: inquest: preventing inquest being held. *Reg.* v. *Price* (M.C. 51), 236

Criminal Information—*defamation: leave to file information when granted: libel on deceased person: foreign nobleman: application by person not resident in the United Kingdom*]—Application having been made to the Court for leave to file a criminal information by a foreign nobleman not resident in this country, in respect of a libel on his deceased father published in an English newspaper,—*Held*, that the Court, in the exercise of its discretion, must refuse the leave, being guided by the following principles:—(*a*) The non-residence of the applicant in this country, as rendering it unlikely that any breach of the peace will follow, is a cogent argument, though not conclusive, against the interference of the Court. (*b*) The fact that the subject of

Criminal Information (continued)—

the libel is dead is, upon the weight of the authorities, an objection which the Court will regard as almost conclusive against allowing an information to be filed. (*c*) To entitle a person to ask the Court for a criminal information he must occupy some public office, and the libel complained of must attack him in relation to such office, not as a private person. A peer, in private matters, is not entitled merely as a peer to the interference of the Court. *The Queen* v. *Labouchere*, 362

Criminal Matter. See PRACTICE.

Cruelty to Animals—12 & 13 Vict. c. 92. ss. 2 and 29, and 17 & 18 Vict. c. 60. s. 3: "domestic animal": decoy bird. *Colam* v. *Paget* (M.C. 64), 338

Damages unliquidated. See CONTRACT.

—— See ACTION; PRACTICE.

Debenture Holders. See RAILWAY.

Debt, Assignment of. See DEBTOR AND CREDITOR.

—— **attachable.** See PRACTICE.

—— See ATTACHMENT OF DEBTS; PROMISSORY NOTE; RENT-CHARGE.

Debtor and Creditor—*chose in action: assignment of debt: "absolute assignment": mortgagor and mortgagee: judicature act*, 1873, *s.* 25, *sub-s.* 6]—By a deed of February, 1883, after reciting that T. was indebted to the plaintiff in the sum of 152*l.*, T. assigned to the plaintiff the debts in the schedule mentioned, upon trust that the plaintiff should receive the same, and, after retaining to himself the sum of 152*l.*, should pay the surplus to T. Then followed a covenant by T. to pay the plaintiff the 152*l.* in the August following, and, if the sum was not paid by that date, to pay interest thereon half yearly until payment in full. In the schedule four debts owing to T., and amounting together to 244*l.*, were set out. In respect of one of them, owed by the defendant, the plaintiff now sued the defendant:—*Held*, that the deed was an "absolute assignment" (not purporting to be by way of charge only) within section 25, sub-s. 6, of the Judicature Act, 1873, and the plaintiff was therefore entitled to maintain the action. *Burlinson* v. *Hall*, 222
The National Provincial Bank v. *Harle* (50 Law J. Rep. Q.B. 437; Law Rep. 6 Q.B. D. 627) distinguished. Ibid.

—— See WILL.

Debtors Act. See PRACTICE; SOLICITOR.

Deck Cargo. See SHIP AND SHIPPING.

Defamation. See CRIMINAL INFORMATION.

Defence. See PRACTICE.

Demand—payment on. See BILL OF SALE.

Demurrage. See CHARTER-PARTY; SHIP AND SHIPPING.

Directors. See COMPANY.

Discovery. See PRACTICE.

Distress. See LANDLORD AND TENANT.

Divorce. See PRACTICE.

Dock Company. See RAILWAY.

Dramatic Piece. See COPYRIGHT.

Easement. See FLOOD; PRESCRIPTION.

Ecclesiastical District. See BURIAL.

Election. See MUNICIPAL ELECTION.

Elegit, Writ of. See JUDGMENT CREDITOR.

Elementary Education Acts—by-laws: detention after hours: "home lessons": assault: 33 & 34 Vict. c. 75. s. 74. *Hunter* v. *Johnson* (M.C. 182), 579

—— by-laws under 33 & 34 Vict. c. 75. s. 74: parent not causing child to attend school: reasonable excuse. *The School Board for London* v. *Duggan* (M.C. 104), 520

—— See SCHOOL BOARD.

Employers' Liability Act. See MASTER AND SERVANT.

Enclosure Act. See MINES.

Equitable Interest. See SHERIFF.

Estoppel. See COMPANY.

Evidence — *infancy: declaration by deceased father as to age of child: admissibility of to prove age*]—The defendant to an action for goods sold, work done, and money paid, set up the defence of infancy. In support of this defence an affidavit made by his father, since deceased, in an administration suit, to which the plaintiff in this action was not a party, containing a statement by the father as to the place and date of the defendant's birth was tendered and received in evi-

Evidence (continued)—

dence:—*Held* (affirming the judgment of the Queen's Bench Division), that such a declaration was only receivable in questions of pedigree, and that no such question was raised in this case, so that the case did not fall within that exception to the general rule as to the inadmissibility of hearsay evidence. *Haines* v. *Guthrie* (App.), 521

—— See PRACTICE.

Execution. See JUDGMENT CREDITOR; PRACTICE; RAILWAY; SHERIFF.

Extradition—arrest without warrant: prisoner in custody: "apprehension": Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 8: jurisdiction: court of appeal: criminal matter: Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19 and 47. *Reg.* v. *Weil* (M.C. 74), 353

Factors Act. See PRINCIPAL AND AGENT.

Final Sailing. See SHIP AND SHIPPING.

Flood—*excessive rainfall: accumulation of water on land: right to send water on to neighbour's land: liability for damage so caused: servitude*]—Owing to an excessive rainfall a quantity of water accumulated on the upper side of the defendants' railway embankment, which crossed some sloping land. They, finding that the pressure of water was causing danger to their embankment, cut trenches through the embankment, and thereby caused the water to flow through and on to the land of the plaintiff, which lay at a lower level on the lower side of the embankment. The jury found that the defendants had acted reasonably, regard being had to the safety of their own property, and that there was no negligence. In an action for damages for the injury thus caused to the land of the plaintiff, —*Held*, that the defendants were liable, for that what they had done was not to ward off a common danger, but to transfer to the land of the plaintiff the danger and mischief already existing on their own land. *Whalley* v. *The Lancashire and Yorkshire Rail. Co.* (App.), 285

Force majeure. See CONTRACT.

Foreign Judgment. See PRACTICE.

Fraud. See COMPANY.

Frauds, Statute of. See HUSBAND AND WIFE.

Freight. See MARINE INSURANCE.

Frost preventing Loading. See SHIP AND SHIPPING.

Gaming—common gaming house: 17 & 18 Vict. c. 38. s. 4: unlawful gaming. *Jenks* v. *Turpin* (M.C. 161), 578

—— and wagering: the Betting Houses Act (1853) Amendment Act, 1874 (37 Vict. c. 15): 16 & 17 Vict. c. 119. *Cox* v. *Andrews* (M.C. 34), 172

Garnishee. See ATTACHMENT OF DEBTS; PRACTICE.

Garnishee Order. See PRACTICE; SOLICITOR AND CLIENT.

General Average. See SHIP AND SHIPPING.

Goods, Delivery of. See CONTRACT.

—— **Loss of.** See INN.

High Court, Jurisdiction of. See BUILDING SOCIETY.

Highway—expenses of diverting footways: costs of independent solicitor retained by local board: Highway Act, 1835 (5 & 6 Will. 4. c. 50), ss. 84 and 101. *United Land Co.* v. *Tottenham Local Board* (M.C. 136), 532

—— liability to repair: main road: portions of a road ceasing to be turnpike road: 41 & 42 Vict. c. 77. s. 13. *The Justices of Lancashire* v. *The Mayor &c. of Rochdale* (M.C. 5), 63

—— liability to repair: turnpike road: main road: Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13. *The Justices of the Peace for the West Riding of the County of York* v. *The Queen* (M.C. 41), 272

—— main road: repair: costs of maintenance: contribution: "county authority of the county in which such road is situated": Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2: Highways (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 13 and 38. *The Mayor &c. of Over Darwen* v. *The Justices of Lancaster* (M.C. 198), 584

—— obstruction: omission to remove: Highway Act, 1835 (5 & 6 Will. 4. c. 50), s. 72: "wilfully obstruct." *Gully* v. *Smith* (M.C. 35), 161

Hotchpot. See WILL.

Husband and Wife—*ante-nuptial memorandum renouncing his marital right signed by husband: creation of separate use for wife of her real property: signature to memorandum: statute of frauds* (29 *Car.* 2. *c.* 3), *s.* 7]—A man, being about to marry a woman who was possessed of real property, signed before the marriage a memorandum by which he covenanted and agreed with the woman that if she should become his lawful wife he bound himself from having any legal or lawful claim upon her property or from receiving or dealing with any property whatsoever which she might possess at the time of her marriage. The woman did not sign this memorandum. The marriage took place in 1856, and in 1880 the wife made a will devising her real estate to the defendants. She died in 1881, and the plaintiff, her heir-at-law, brought an action to establish his title to her real estate:—*Held*, that the plaintiff was entitled to recover, for that the memorandum of agreement, not being signed by the woman, was not a valid declaration of a trust for her separate use under section 7 of the Statute of Frauds; that the renunciation by the husband of his marital right was not sufficient to clothe the wife with testamentary power over her real property; and that the husband who did not possess the fee could not make a valid declaration of the trust of that fee. *Dye* v. *Dye* (App), 442

—— *married women's property act*, 1882: *assault before the passing of the act: coverture: right to sue alone: practice*]—The Married Women's Property Act, 1882, does not enable a married woman to bring an action for an assault committed upon her during coverture before the passing of the Act without joining her husband. *Weldon* v. *Riviere*, 448

—— *separation deed: covenants, how far interdependent: payment of annuity: covenant that wife should not molest husband: molestation*]—To an action by the wife's trustee in a separation deed against the husband for arrears of annuity covenanted to be paid by him, the defendant set up as an answer the breach of the trustee's covenant that his wife should not molest him; he further counterclaimed damages for molestation by her. The wife had been living during the separation in adultery, and had given birth to a child of which the defendant was not the father, and there was some evidence that she represented it as being defendant's son and heir. *Held* (by DENMAN, J., and MANISTY, J.), that in the absence of any express provision in the deed making the performance of the covenant by the wife and her trustee a condition precedent to the payment of the annuity, the covenants were independent, and molestation by the wife afforded no answer to the action for the arrears of the annuity. *Held* further, that the fact of the wife living in adultery, even coupled with that of her having given birth to a bastard child, did not constitute molestation. *Fearon* v. *The Earl of Aylesford*, 410

Per DENMAN, J. (*dubitante* MANISTY, J.).—If the wife caused the child to be called by her husband's name and second title, and held it out as being the defendant's son and heir, this, being obviously calculated to cause the defendant personal annoyance, might amount to molestation. Ibid.

—— See PRACTICE.

Income Tax. See REVENUE.

Indemnity. See PRACTICE.

Infant—*necessaries: infant already supplied: evidence*]—An infant who was sued for the price of goods supplied to him on credit tendered evidence that he was already sufficiently supplied with goods of the kind in question:—*Held* (*dubitante* MANISTY, J.), that the evidence was admissible, although it was not alleged that the plaintiffs knew that the defendant was so supplied. *Barnes & Co.* v. *Toye*, 567

—— See EVIDENCE.

Inn—*innkeeper's liability: loss of goods by traveller: temporary refreshment at hotel: "guest"*]—The plaintiff arrived at the Carlisle Station, and entrusted his luggage to an hotel porter with the intention of spending the night at the defendants' hotel. On his arrival at the hotel a telegram caused the plaintiff to change his mind, and he therefore gave up his intention of spending the night at Carlisle, and went into the coffee-room for the purpose of getting some refreshments. Not being able to get in the coffee-room what he required, the plaintiff was referred by one of the defendants' servants to the station refreshment-room, which was connected with the hotel by a covered passage, and which was under the management of the defendants, the hotel and the refreshment-room being, in fact, held under one licence. On his way to the refreshment-room along this covered passage, the plaintiff met the hotel porter with his luggage, which was at the plaintiff's request deposited in the defendants' lock-up room for luggage. The plaintiff had, and paid for, something to eat and drink in the refreshment-room. On enquiring for his luggage a few hours afterwards, a portion of it was found to be missing. In an action brought against the defendants, as innkeepers, to recover the value of the missing property,—*Held*, that there was no evidence to establish the relation of landlord and guest between the plaintiff and defendants so as to make the latter liable, as innkeepers, for the value of the goods in question. *Strauss* v. *The County Hotel and Wine Co.* (*Lim.*), 25

Inspection. See PRACTICE.

Insurance. See REVENUE; SHIP AND SHIPPING.

Interpleader. See PRACTICE.

Interrogatories. See PRACTICE.

Ireland, Writ in. See PRACTICE.

Jettison. See SHIP AND SHIPPING.

Joinder of Causes of Action. See PRACTICE.

Judge at Chambers. See PRACTICE.

Judgment. See PRACTICE.

Judgment Creditor—*writ of elegit: effect of bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 146 *and* 169, *on goods seized but not delivered before the* 1*st of January*, 1884]—Section 146 of the Bankruptcy Act, 1883, enacts that "the sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods"; and section 169 repeals so much of 13 Edw. I. c. 18 as relates to the chattels of a debtor, but enacts that the repeal shall not affect anything done or suffered or any right or privilege acquired before the commencement of the Act:—*Held*, that a judgment creditor, who had obtained judgment and sued out a writ of *elegit*, was entitled to delivery of the goods seized under that writ in December, 1883, although the inquisition had not been held and the goods had not been delivered before the 1st of January, 1884, when the Bankruptcy Act, 1883, came into force. *Hough* v. *Windus* (App.), 165

—— See PRACTICE.

Jurisdiction, Service out of. See PRACTICE.

—— See BANKRUPTCY; COUNTY COURT.

Land, Possession of. See PRACTICE.

—— **Recovery of.** See PRACTICE.

—— **Transfer Act.** See BUILDING SOCIETY.

Landlord and Tenant—*agreement by tenant to pay "all rates, taxes and assessments": cost of paving: metropolis management acts*, 18 & 19 *Vict. c.* 120. *s.* 105, *and* 25 & 26 *Vict. c.* 102. *s.* 96]—The defendant was tenant to the plaintiffs of a house under an agreement for a lease, by which he agreed to pay "all rates, taxes and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax)." The plaintiffs, having been compelled to pay the amount apportioned by the vestry in respect of the said house for the expense of paving the street in which it was situated, now claimed repayment from the defendant under the agreement:—*Held*, that this was not a "rate, tax or assessment" from which the defendant by his agreement undertook to relieve the plaintiffs, and that therefore the plaintiffs were not entitled to maintain an action against the defendant in respect of the amount so paid by them. *Wilkinson* v. *Collyer*, 278

Hartley v. *Hudson* (48 Law J. Rep. C.P. 751; Law Rep. 4 C.P. D. 367). Ibid.

—— *breach of covenant for quiet enjoyment*]—A general system of drainage, consisting of lines of underground drains fed by transverse lines of field drains, was formed over an enclosed district which embraced certain farms of the defendants. Among these farms were a farm let to the plaintiff, and a farm lying above and adjoining it. In 1865 the upper farm was demised to C, the demise including "waters and water courses," with a right to use the drains through the plaintiff's land, for the purpose of carrying away from C's land so much water as they were adequate to carry. Subsequently the lower farm was demised to the plaintiff, the lease containing the usual covenant for quiet enjoyment without interruption by the lessors or any person lawfully claiming through or under them. By an excessive user on his farm by C of the drainage system which was properly constructed, the plaintiff's land at O was injured. The plaintiff's land at Q was also injured by the proper user by C of drains passing through the plaintiff's land which were improperly constructed:—*Held*, that the defendants were in no way liable to the plaintiff for the damage done at O, but that it was otherwise with respect to the damage done at Q, there having been a substantial interruption by C, a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, so as to constitute a breach of the covenant for quiet enjoyment. *Sanderson* v. *The Mayor &c. of Berwick-upon Tweed* (App.), 559

—— *covenant by landlord to pay "all rates and taxes": water rates: waterworks clauses act*, 1847 (10 *Vict. c.* 17), *ss.* 3 *and* 72]—A covenant by the landlord to pay "all rates and taxes chargeable in respect of the premises" includes the payment of water rates. *The Direct Spanish Telegraph Co.* (*Lim*), v. *Shepherd*, 420

—— *distress: illegal sale by landlord: statute* 2 *Will. & Mary, sess.* 1. *c.* 5: *declaration by lodger: lodgers' protection act*, 1871 (34 & 35 *Vict. c.* 79. *ss.* 1 *and* 2]—The plaintiff was a lodger to a tenant upon whose premises a distress had been levied by the defendant, the superior landlord. The distress was on

Landlord and Tenant (continued)—

the 17th of October, and among the goods seized was certain property belonging to the plaintiff. The goods so seized were sold on the 22nd of October—that is to say, before the time limited by the provisions of 2 Will. & Mary, sess. 1. c. 5, had expired. On the 23rd of October the plaintiff served on the defendant the declaration required by the Lodgers' Protection Act, 1871, section 1, and subsequently brought an action against him for a wrongful sale of the goods:—*Held*, that the plaintiff was entitled to recover, inasmuch as the sale by the defendant on the 22nd of October was illegal, and the plaintiff had thereby lost the opportunity which he would otherwise have had of protecting his goods under the provisions of 34 & 35 Vict. c. 79. *Sharp* v. *Fowle*, 309

—— *distress on goods of lodger for rent due from tenant: declaration under lodgers' goods protection act* (34 & 35 *Vict. c.* 79): *renewal of declaration upon second distress*]—A landlord having seized the goods of the plaintiff, who was a lodger under his immediate tenant, for rent due from the immediate tenant, the lodger served him with a declaration under the Lodgers' Goods Protection Act, stating that the goods were hers and that she owed no rent to the immediate tenant. The landlord withdrew the distress, making an arrangement with his tenant by which the tenant paid part of the rent due and promised to pay the remainder by weekly instalments. The tenant did not pay the instalments or the weekly rent accruing due, and the landlord shortly after distrained the same goods for the whole sum then due to him from his tenant. The lodger did not give a fresh declaration under the Act, and her furniture was sold. In an action by her for trespass to her goods,—*Held*, affirming the judgment of the Queen's Bench Division, that the plaintiff could not recover; that the declaration given on the occasion of the first distress did not protect her goods against the second distress by the landlord; and that the second distress was not illegal at common law, because there had not been any voluntary abandonment by the landlord of the first distress. *Thwaites* v. *Wilding* (App.), 1

—— See LESSOR AND LESSEE; PRACTICE.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 38 *and* 51: *disputed compensation: costs: verdict for more than "the sum previously offered": offer increased after notifying intention to have jury summoned*]—Promoters of an undertaking authorised by a special Act giving power to take lands otherwise than by agreement, after they had, in pursuance of the Lands Clauses Consolidation Act, 1845, s. 38, given to an owner of lands required by them, on whom they had previously served a notice to treat, notice of their intention to cause a jury to be summoned for ascertaining the compensation to be paid to him, and in that notice offered a certain sum, made a larger offer. A verdict being given for more than the first offer, although less than the second,—*Held*, that, under section 51, all the costs of the enquiry were to be borne by the promoters. *Reg.* v. *Manley Smith. In re Westfield* v. *The Metropolitan and Metropolitan District Rail. Co.*, 115

—— Jervis's Act: compensation not exceeding 50*l.*: "settlement by two justices": "order": "damages directed to be paid": 8 Vict. c. 18. ss. 22 and 24: 8 Vict. c. 20. ss. 6, 16, and 140: 11 & 12 Vict. c. 43. s. 11. *Reg.* v. *Edwards* (Justice) *and the Eastern and Midland Rail. Co.* (M.C. 149), 558

Last Port. See SHIP AND SHIPPING.

Legacy. See WILL.

Lessor and Lessee—*covenant: perpetual renewal: presumption of law*]—A lessor demised to a lessee certain hereditaments for the natural lives of three persons. The lease contained a covenant that the lessor, his heirs and assigns, upon the lessee "surrendering this present demise as hereinafter mentioned," would, at any time thereafter, at the request of the lessee, his heirs or assigns, as often as one or two life or lives of and in the hereditaments granted "shall drop and be determined, renew, fill up and grant a further term of and in the said premises for any other life or two lives of any other person or persons to be nominated by" the lessee, his heirs or assigns, in the place of the life or lives so determining: the lessee, his heirs or assigns, paying to the lessor for every such renewal for every life the sum of 40*s.*, "and at the same time surrendering or delivering up this present demise to be cancelled":—*Held*, that this was a covenant for a perpetual renewal. *Swinburne* v. *Milburn* (App.), 226

Libel. See CRIMINAL INFORMATION.

Licensing — mortgagee: power of attorney: renewal without concurrence of licence-holder: appeal: person aggrieved: 9 Geo. 4. c. 61. s. 27. *Garrett* v. *The Licensing Justices of St. Marylebone* (M.C. 81), 574

—— "selling liquor to a drunken person": no indication of insobriety: *mens rea*: 35 & 36 Vict. c. 94. s. 13: "drunken person." *Cundy* v. *Le Cocq* (M.C. 125), 578

—— licensing act, 1872 (35 & 36 Vict. c. 94), s. 17—suffering gaming on licensed premises: knowledge of servant: proof of knowledge on part of innkeeper: *mens rea*. *Somerset* v. *Hart* (M.C 77), 481

Lien. See SOLICITOR AND CLIENT.

Limitations, Statute of. See RIGHT OF SUPPORT.

Local Authority. See STREET.

Local Board. See PENAL ACTION.

Lodger. See LANDLORD AND TENANT.

Lunatic—*bankruptcy: permission to committee to file declaration of insolvency in name of lunatic: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (*f*) *and* 148]—If it appears to be for the benefit of a lunatic that he should be made bankrupt the Court will permit the committee to commit an act of bankruptcy in the name of the lunatic under the Bankruptcy Act, 1883, s. 4 (*f*). *In re James* (*a lunatic*) (App.), 575

Mandamus—*revenue: commissioners of inland revenue: return of probate duty:* 5 & 6 *Vict. c.* 79. *s.* 23*: petition of right*]—The rule governing the discretion of the Court as to granting a mandamus is, that where there is no specific remedy, a mandamus will be granted, that justice may be done. A petition of right is such a remedy, though it depends upon the fiat of the Attorney-General being given. *Reg.* v. *The Commissioners of Inland Revenue* (App.), 229

The prosecutor applied for a mandamus to the defendants to return excess of probate duty, under 5 & 6 Vict. c. 79. s. 23. Probate duty is paid to the defendants to and for the use of the Crown, and when received it is handed over by them to the Crown. The defendants had declined to return the duty paid, on the ground that they were not satisfied of the lawfulness of the claim:—*Held*, that, assuming the claimant to be entitled to some remedy, still a mandamus ought not to issue, for that there was a specific remedy by petition of right, inasmuch as the money was in the hands of the Crown. Ibid.

The King v. *The Lords of the Treasury* (5 Law J. Rep. K.B. 20) dissented from. Ibid.

Manor. See MINES.

Marine Insurance—*separate policies on ship and freight: collision: abandonment: payment for total loss on ship: right of underwriters on ship to damages recovered by assured for unearned freight*]—The defendants effected a policy of insurance on their ship for 1,000*l.* with the plaintiffs; but insured the freight with other underwriters. The ship, while proceeding to her port of loading under a charter-party, was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who settled with them as for a total loss. The plaintiffs afterwards recovered in the Admiralty Division against the owner of the other ship damages in respect of the loss of the ship and also of the freight which had not been earned:—*Held*, that the plaintiffs were not entitled to recover the damages recovered in respect of the loss of freight, such damages being in the nature of salvage on freight: for freight which has not been earned is not an incident of the ownership of the ship, and does not therefore pass to the underwriters, who have paid as for a total loss on the ship. *The Sea Insurance Co.* (*Lim.*) v. *Hadden*, 252

—— See COMPANY; SHIP AND SHIPPING.

Married Women's Property Act. See HUSBAND AND WIFE; PRACTICE.

Master, Jurisdiction of. See PRACTICE.

—— **Reference to.** See PRACTICE.

Master and Servant—*employers' liability act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1, *s.* 2*: defect in condition of plant*]—The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), gives a workman a right of action against his employer for personal injury caused by reason of any defect in the condition of the works, machinery, or plant connected with or used in the business of the employer which arises from the negligence of the employer. This provision applies to works and plant consisting of a combination of several pieces of plant, each of which is in itself sound and fit for use, but which when combined form unsound and defective plant, so that injury is caused to a workman using it. *Cripps* v. *Judge* (App.), 517

Heske v. *Samuelson* (*ante*, p. 45) approved. Ibid.

—— *employers' liability act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5*: negligence of person having "charge or control of" points on a railway*]—The representatives of a workman on a railway who was killed by an accident caused by the negligence of a fellow-workman, brought an action under 43 & 44 Vict. c. 42 against the railway company for compensation. The evidence shewed that the fellow-workman acted under an inspector, that he did not control the points, that his duty was to oil and clean locking bars at twelve places, and that it was in doing this work that he left an obstruction on the line, which caused the death of the deceased workman:—*Held* (affirming the judgment of the Queen's Bench Division), that the defendants were not liable, for that there was no evidence to go to a jury that the workman whose negligence caused the accident was a person having "the charge or control of any signal, points, locomotive engine, or train upon a railway." *Gibbs* v. *The Great Western Rail. Co.* (App.), 543

Master and Servant (continued)—

—— *employers' liability act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 7: *notice of injury: omission of date: "defect or inaccuracy": defendant not prejudiced*]—The omission of the date of the accident from a notice of injury under the Employers' Liability Act is a "defect or inaccuracy" within the meaning of section 7 of the Act, and the notice is not invalidated thereby unless the defendant is prejudiced in his defence and there was an intention to mislead. *Carter* v. *Drysdale*, 557

—— *pleading: defect causing injury to servant: knowledge of master: ignorance of servant: negligence*]—In an action by a servant against his master for injuries sustained by him in the course of his employment by reason of the defective condition of the machinery which the servant has to use, or of the premises upon which he has to work, or of the means by which the service is to be fulfilled, the statement of claim must allege, not only that the master knew, but also that the servant was ignorant of the danger which was the cause of the injuries sustained. *Griffiths* v. *The London and St. Katharine Docks Co.* (App.), 504

—— (43 & 44 *Vict. c.* 42), *s.* 8: *employers and workmen act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10: *omnibus conductor: workman: person engaged in manual labour*]—An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of the Employers and Workmen Act, 1875, s. 10. *Morgan* v. *The London General Omnibus Co.* (App.), 352

—— (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1: *personal injuries to workman: "defect" in "condition" of machinery: improper use of "lift"*]—The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which gives a right of action to a workman for personal injuries caused to him by reason of any "defect in the condition" of "the machinery or plant connected with or used in the business of the employer," applies to a machine which, though perfect as far as itself is concerned, is unfit for the purpose for which it is used. *Heske* v. *Samuelson & Co.*, 45

The deceased was engaged as a workman at the foot of a blasting furnace some eighty-five feet high, and it was part of his duty to fill barrows with coke and to wheel them on to a platform. Whilst the coke was being raised by means of a lift to the edge of the furnace, a large piece fell from the lift, which was not fenced at the side, upon the deceased, who was standing on the platform below in the performance of his duties, and killed him:—*Held*, that there was a "defect in the condition" of the lift within the meaning of 43 & 44 Vict. c. 42, s. 1, sub-s. 1. Ibid.

—— infant apprentice: Employers and Workmen Act (38 & 39 Vict. c. 90): validity of indenture of apprenticeship: stipulation to the prejudice of infant. *Meakin* v. *Morris* (M.C. 72), 430

Merchant Shipping Act. See SHIP AND SHIPPING.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 96: *street vested in local authority: property of, in air above street: right of to restrain wire from being carried over street: wire causing no nuisance or danger: telegraph acts*, 26 & 27 *Vict. c.* 112, 31 & 32 *Vict. c.* 110, 32 & 33 *Vict. c.* 73]—The plaintiffs, a local authority, in whom a street was vested and under whose control and management it was placed by 18 & 19 Vict. c. 120. s. 96, sought for an injunction to restrain the defendants from carrying telephone wires diagonally across the street at the level of the chimneys, the owners of the houses not objecting, and the wires causing neither nuisance nor appreciable danger:—*Held*, that the plaintiffs were not entitled to the injunction sought for; for they had, on the principle laid down in *Coverdale* v. *Charlton* (48 Law J. Rep. Q.B. 128), only such a limited statutory property in the street, both with regard to depth below and height above the surface of the street, as was necessary for their control of and for the safe and convenient user of the street, and that as the wires caused neither nuisance nor appreciable danger there had been no infringement of their right. *The Board of Works for the Wandsworth District* v. *The United Telephone Co.* (*Lim.*) (App.), 449

—— building beyond line of street: Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75: "general line of buildings": "to be decided by the superintending architect": jurisdiction of magistrate: architect's decision. *The Plumstead District Board of Works* v. *Spackman* (M.C. 142), 571

—— (18 & 19 Vict. c. 120), s. 250: "owner": Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77: "owner of land abutting on" new street: liability to contribute to expenses of paving: owner of strip a few inches wide bound to maintain fence. *Williams* v. *The Wandsworth Board of Works* (M.C. 187), 584

—— See LANDLORD AND TENANT.

Mines—*support to surface: enclosure act: reservation of mining rights to lord of manor: compensation for damage*]—By an Enclosure Act passed in 1771, allotments of common land were made to tenants of a manor entitled to rights of common, to be held on the same

Mines (continued)—

tenure as the tenements in respect of which they were allotted. The Act provided that nothing therein contained was to lessen, prejudice or defeat the right and interest of the lords of the manor and their successors of, in, or to the royalties incident or belonging to the manor, but that they and all persons claiming under them should for ever thereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owners of the manor belonging (other than the right of common) in as full, ample and beneficial manner, to all intents and purposes, as they could have held and enjoyed them in case the Act had not been made. The Act further provided that if the lords of the manor, or any one claiming under them, should work any mines lying under any of the allotments so to be made, or lay, make or use any ways in, through, over or along any part of the allotments, then the person so working should make satisfaction for the damage and spoil of the ground so occasioned to the person in possession of the ground at the time of the damage, such satisfaction not to exceed the sum of 5*l.* yearly during the time of such working for every acre of ground so damaged or spoiled. There were under the manor coal mines, portions of which had for two centuries been worked by the lords or their lessees without leaving any support for the surface. There were no special customs as to working mines under the common lands. The appellants, lessees from the lords of the mines under a freehold allotment, by their working let down the surface of the allotment and damaged a house which had been erected thereon upwards of twenty years before. The surface would have subsided if there had been no house on it:—*Held*, that the reservation to the lords did not confer any right to work the mines so as to let down the surface, and that no such right was implied in the compensation clause, which was to be regarded as limited to damage caused by workings on the surface: consequently that the respondents (the owner and occupier of the allotment) were entitled to support from the mines and to full damages for the injury sustained by the subsidence. *Love* v. *Bell* (H.L.), 257

—— See RIGHT OF SUPPORT.

Misnomer. See MUNICIPAL ELECTIONS ACT.

Mortgage. See BANKRUPTCY; BUILDING SOCIETY.

Mortgagor and Mortgagee. See DEBTOR AND CREDITOR; PRACTICE.

Motion. See PRACTICE.

Municipal Corporations—*burgess qualification: occupation of part of a house: municipal corporations act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9 *and* 31: *registration act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5]—By the operation of the Municipal Corporations Act, 1882, the municipal franchise in respect to parts of a house is assimilated to the Parliamentary franchise, and the sole and exclusive occupation of part of a house gives a municipal qualification, although the part is not occupied for business purposes, as required by the Registration Act, 1878. *Greenway* v. *Batchelor. Aldridge's Case*, 180

Municipal Election—*aldermen: voting paper: signature by other than voter named in body: municipal corporations act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 60]—At an election of aldermen under the Municipal Corporation Act, 1882, section 60, certain voting-papers were signed in a name other than that written at the top after the words "I, the undersigned." Upon petition, it was objected that those papers were therefore void. Evidence was tendered shewing that they were signed and personally delivered to the chairman, with the intention of thereby voting for the candidates named thereon, by the persons in whose names they were signed:—*Held*, that such evidence was admissible, and that the voting-papers were proper to be counted. *Summers* v. *Moorhouse. Wakefield Municipal Election Petition*, 564

—— *municipal elections act*, 1875, *s.* 1, *sub-s.* 2 —*nomination paper: misnomer: "situation of property in respect of which burgess subscribing is enrolled on burgess roll": abbreviation of christian name*]—The provision of section 1, sub-section 2, of the Municipal Elections Act, 1875 (which was repealed by 45 & 46 Vict. c. 50), that "the nomination paper . . . . shall be in the form No. 2 set forth in the schedule to the Act, or to the like effect," is mandatory and not directory; but a nomination paper signed by an enrolled burgess which contains such a description of the property occupied by him at the time of subscribing such nomination paper as will enable a person to refer to the burgess roll to see whether the candidate is nominated by duly enrolled burgesses is a sufficient compliance with the words of the section "to the like effect," even though the qualification of the burgess is in respect of a successive occupation. *Henry* v. *Armitage* (App.), 111

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 165) reversed. Ibid.

The provisions of sub-section 2, that "the nomination paper shall state the surname and other names of the person nominated," are satisfied if such paper contains an abbreviation of a Christian name which is universally understood as meaning that name and none other; so that a nomination paper which

Municipal Election (continued)—

contains the abbreviation "Wm." as meaning "William," is a sufficient statement of the Christian name of the person nominated within the meaning of the sub-section. Ibid.

Municipal Vote. See PARLIAMENT.

Mutual Insurance. See COMPANY.

Name, Abbreviation of. See MUNICIPAL ELECTIONS ACT.

Necessaries. See INFANT.

Negligence—*contributory negligence: railway company: level crossing: accident caused by plaintiff's negligence*]—The defendant's line of railway crossed a public footway and carriage way on the level. There were carriage gates at the crossing, which were locked, a gatekeeper being stationed there by the defendants, whose duty it was to open and shut them when required; the wicket-gates used by foot passengers were not fastened. There were trees and houses on one side of the crossing so situated as to make it impossible for any one crossing from the down side to see a train coming until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view of the line for a distance of about 300 yards. The plaintiff passed through the wicket-gate for the purpose of crossing from the down-line side to the up-line side of the crossing, and walked over the down line to the centre of the crossing, and thence on to the up line, when he was knocked down and injured by a train travelling on the up line. The plaintiff admitted that if he had looked along the up line before actually crossing the up metals he must have seen the approaching train; but he also said that he was misled by the conduct of the gate-keeper, who did not take any steps to warn the plaintiff of the danger of crossing, or to prevent him from doing so. It was also admitted that the engine-driver of the train did not whistle. Upon these facts, the Judge at the trial non-suited the plaintiff:—*Held* (*per* BRETT, M.R., and BOWEN, L.J.; BAGGALLAY, L.J., *dissentiente*), that the nonsuit was right, upon the ground that the uncontradicted evidence of the plaintiff, and the admitted facts, shewed that the accident was solely due to the plaintiff's own recklessness, and that there was no evidence of negligence on the part of the defendants. *Darey* v. *The London and South Western Rail. Co.* (App.), 58

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 665) affirmed. Ibid.

—— See ACTION; EMPLOYERS' LIABILITY ACT; MASTER AND SERVANT; TRAMWAYS ACT.

New Trial. See PRACTICE.

Nomination. See MUNICIPAL ELECTIONS ACT.

Notice. See MASTER AND SERVANT.

Overseers, Notice to. See PARLIAMENT.

Owners' Risk. See RAILWAY COMPANY.

Parish. See BURIAL.

Parliament—*county vote: forty-shilling freeholds: "actual bona fide occupation": 2 Will. 4. c. 45. ss. 18 and 26: 8 Hen. 6. c. 7*]—Rentcharges for life or lives below the annual value of 5*l.*, requiring "actual and *bona fide* occupation" under section 18 of the Reform Act, 1832, do not qualify for a vote at county elections, being incapable of such occupation. *Druitt* v. *The Overseers of Christchurch*, 177

—— *county vote: rentcharge: actual possession: reform act*, 1832 (2 *Will.* 4. *c.* 45), *s.* 26: *statute of uses* (27 *Hen.* 8. *c.* 10)]—By indenture dated the 15th of January, 1883, A conveyed three freehold rentcharges to B, C and D, to hold to the said B, C and D, to the use of the said A, B, C and D, their heirs and assigns for ever, in equal one-fourth shares, as tenants in common:—*Held*, that the grant to B, C and D operated under the Statute of Uses, so as to give actual possession to them of the rentcharge, and to qualify them as county voters on the last day of July, 1883, under 2 Will. 4. c. 45. s. 26. *Lowcock* v. *The Overseers of Broughton*, 144

—— *house of commons: privilege: resolutions and orders as to internal affairs: jurisdiction of the high court*]—No action will lie against an officer of the House of Commons for acts done under an order of the House, with the execution of which he is charged by a resolution of the House itself, although such resolution may forbid a member of the House to do that which by the law of the land he has a right to do. *Bradlaugh* v. *Gossett*, 209

The Court will not enquire into the legality of a resolution of the House in respect of its internal discipline and the conduct of its own members. Ibid.

—— *municipal vote: divisions* 1 *and* 3: *objection: transfer from one division to the other*: 41 *&* 42 *Vict. c.* 26, *sections* 15 *and* 28]—In the revision of lists made out in divisions under section 16 of the Parliamentary and Municipal Registration Act, 1878, where objection is made to the Parliamentary qualification of a person placed in division 1—containing both Parliamentary and municipal

Parliament (continued)—

voters—and that objection is sustained, and no proof is produced of a municipal qualification, "the result of the revision," under section 28, sub-s. 15, is that the person in question has no right on the list at all, and the Barrister is not bound to place him in division 3 containing persons having the municipal qualification only. *Greenway* v. *Batchelor. Jacob's Case*, 179

—— *registration: notice of objection: county vote: defect in notice to overseers: incorrect date: publication by overseers: waiver:* 6 *Vict. c.* 18]—A notice of objection to a claim given to overseers in a county, under the provisions of 6 Vict. c. 18. s. 7, was dated the 18th day of August, 1880, instead of the 18th day of August, 1883. Sufficient notice of objection was given to the claimant, and the overseers duly published a list of objections, including the name of the claimant objected to:—*Held*, that the notice of objection given to the overseers was defective, and that the defect was one which the overseers had no power to waive. *Freeman* v. *Newman*, 108

Particulars. See PRACTICE.

Parties to Action. See PRACTICE.

Partnership. See COMPANY; REVENUE.

Paving, Expense of. See STREET.

Payment into Court. See PRACTICE.

Pedigree. See EVIDENCE.

Penal Action—*public health act*, 1875, *s.* 193: *penalty on officer interested in local board contract: remission of penalty by crown:* 22 *Vict. c.* 32]—The Act 22 Vict. c. 32, which makes it lawful for the Crown to remit any sum of money which under any Act may be imposed as a penalty or forfeiture on a convicted offender, does not apply to a case where judgment for the penalty mentioned in section 193 of the Public Health Act, 1875, is obtained in an action against a clerk to a local board for having been interested in a contract made with the local authority whose officer he is. *Todd* v. *Robinson*, 251

Penalty. See SHIP AND SHIPPING.

Pension. See ATTACHMENT OF DEBTS.

Person, Injury to. See ACTION.

Petition of Right. See MANDAMUS.

Piracy. See COPYRIGHT.

Plant. See RAILWAY.

Pleading. See MASTER AND SERVANT.

Police. See ATTACHMENT OF DEBTS.

Policy. See MARINE INSURANCE; SHIP AND SHIPPING.

Poor—derivative settlement: Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35. *The Guardians of The Parish of Marylebone* v. *The Guardians of the Union of Wycombe* (M.C. 12), 45

—— Divided Parishes Act (39 & 40 Vict. c. 61), s. 35: pauper: order of removal: children under sixteen: birth settlement of father: widowed mother: derivative settlement. *The Guardians of the Parish of Liverpool* v. *The Guardians of the Portsea Union* (M.C. 58), 347

—— husband and wife: maintenance of married woman: amount which husband can be ordered to pay: 31 & 32 Vict. c. 122. s. 33. *Dinning* v. *The South Shields Union* (M.C. 90), 517

—— maintenance of married woman: order on husband: 31 & 32 Vict. c. 122 (Poor Law Amendment Act, 1868), s. 33. *Dinning* v. *The Guardians of the South Shields Union* (M.C. 56), 265

—— order of removal: children deserted by widowed mother: derivative settlement: birth settlement of children: Divided Parishes Act (39 & 40 Vict. c. 61), s. 35. *The Guardians of Headington Union, Oxford*, v. *The Guardians of St. Olave's Union, Surrey* (M.C. 91), 421

—— rate: rateable value: occupier under restrictions: school board. *Reg.* v. *The West Bromwich School Board* (M.C. 67), 459

—— rate: telegraph wires: exclusive occupation: 43 Eliz. c. 2. *The Paris and New York Telegraph Co.* v. *The Penzance Union* (M.C. 189), 582

—— rate: telephone company: rateability of wires: occupation: licence. *The Lancashire and Cheshire Telephone Exchange Co. (Lim.)* v. *The Overseers of the Township of Manchester* (M.C. 195), 582

—— rating: school board: land owned and land rented by school board: Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 18, 19, 21, 22, and 53: 6 & 7 Will. 4. c. 96. s. 1. *Reg.* v. *The West Bromwich School Board* (M.C. 153), 571

Poor (continued)—

—— rating: quinquennial valuation: supplemental valuation: alteration: preceding twelve months: evidence: Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 46 and 47. *Reg.* v. *The East and West India Docks Co.* (M.C. 97), 461

—— settlement of illegitimate children: derivative settlement of mother: Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35. *In re The Guardians of the Parish of Marylebone* v. *The Guardians of the Wycombe Union* (M.C. 88), 427

—— settlement: irremovability: residence: 39 & 40 Vict. c. 61. s. 34: mother and son: breach of residence. *The Guardians of Merthyr Tydvil Union* v. *The Guardians of Stepney Union* (M.C. 183), 579

Port of Refuge. See SHIP AND SHIPPING.

Possession of Land. See PRACTICE.

Poundage. See SHERIFF.

Practice—*action for recovery of land: right of equitable mortgagee of defendant, not being a party to the action, to intervene: application by him to set aside judgment signed against defendant by default: notice of such application to defendant: mode of proceeding: rules of court*, 1883, *order XXVII. rules 7 and* 15]—A stranger to an action, who is injuriously affected by a judgment signed by default against the defendant to the action, may obtain the defendant's leave to use his name, and can then apply in that name to set the judgment aside; or he may take out a summons in his own name asking to have the judgment set aside, and serve the summons on both the plaintiff and the defendant; but he cannot apply to set the judgment so signed aside without making both the plaintiff and the defendant parties to the application. *Jacques* v. *Harrison* (App.), 137

Judgment was signed by default against a defendant in an action for recovery of land. The equitable mortgagee of the defendant, being the person really interested in the land, applied by a summons, which was not served on the defendant, to set this judgment aside: —*Held*, that the judgment ought to be set aside on terms, and that the equitable mortgagee ought to be allowed to defend in the name of the defendant; but that this could not be done without notice to the defendant. Ibid.

—— *action on foreign judgment: debt arising out of contract: order III. rule 6: leave to sign judgment: order XIV. rule* 1]—An action upon a foreign judgment is an action of debt arising out of a contract within the meaning of Order III. rule 6, in which leave may be given to the plaintiff under Order XIV. to sign final judgment for the amount claimed. *Grant* v. *Easton* (App.), 68

Hodsoll v. *Baxter* (28 Law J. Rep. Q.B. 61) followed. Ibid.

—— *alimony: arrears of, not recoverable by action: 20 & 21 Vict. c. 85. ss. 32 and* 52]—The power to order payment of alimony *pendente lite* is exercised by the Judge of the Probate, Divorce, and Admiralty Division by virtue of the Matrimonial Causes Act, 1857, and section 52 of that Act provides that the orders of the Court shall be enforced in the same manner as the orders of the High Court of Chancery "may be now enforced":—*Held*, that inasmuch as an action to enforce an order of the Court of Chancery could not have been maintained at the date of the commencement of the Act, a wife to whom payment of alimony has been ordered, cannot sue in the Queen's Bench Division to recover arrears of alimony. *Bailey* v. *Bailey* (App.), 583

—— *appeal: costs: order on solicitor to pay costs personally: judicature act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 49: *rules of court*, 1883, *order LXV. rule* 1]—A solicitor having been adjudged by a Judge at chambers to have taken out a summons without sufficient authority was personally ordered to pay the costs of that summons:—*Held* (reversing the judgment of the Queen's Bench Division), that such an order is more than an order "as to costs only which by law are left to the discretion of the Court," and, therefore, that an appeal from such an order, without leave first obtained, is not forbidden by section 49 of the Judicature Act, 1873. *In re Milton, Bradford and others* (App.), 65

—— *appeal from county court: order XXXIX. rule 6: improper rejection of evidence: no new trial where no miscarriage: county courts act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6]—Order XXXIX. rule 6 applies to applications for new trials from a County Court under section 6 of 38 & 39 Vict. c. 50. Where, therefore, evidence had been improperly rejected by the County Court Judge, but the Court, on the hearing of the motion, were of opinion that no miscarriage of justice had been thereby occasioned, a new trial was refused. *Shapcott* v. *Chappell*, 77

—— *appeal: jurisdiction of court of appeal: solicitor: appeal from order striking off the rolls: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47]—An appeal lies from an order of the High Court striking a solicitor off the Rolls for misconduct as a solicitor, for the Court in such a case exercises its disciplinary jurisdiction over one of its officers, and does not give a judgment in a criminal cause or matter within the meaning of section 47 of the Judicature Act, 1873. *In re Hardwick* (App.), 64

Practice (continued) –

—— *attachment of debts: debt due to judgment debtor and another jointly not attachable*] —A debt due from a garnishee to the judgment debtor and another jointly cannot be attached by a judgment creditor to satisfy a judgment obtained against the judgment debtor alone. *Macdonald* v. *The Tacquah Gold Mine Co.* (App.), 376

—— *charging order: mode of enforcing: 1 & 2 Vict. c. 110. ss. 14 and 15: order XLVI. rule 1: judicature act*, 1873, *s.* 24]—An order charging a judgment debt on shares in a company, obtained under 1 & 2 Vict. c. 110, cannot be enforced by a summary order in the action for the sale of the shares. *Leggott* v. *Western*, 316

—— *costs: mode of taxation: reference, with costs to abide the event: award in favour of defendant, certain issues being found for plaintiff: costs of separate issues*]—In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into Court in satisfaction of the plaintiffs' claim. This sum the plaintiffs did not accept. The cause was referred—the costs of the cause, reference, and award to abide the event. The arbitrator found all the issues, except one as to special damage, in favour of the plaintiffs; and he also found that the money paid into Court was enough to satisfy the plaintiffs' claim in respect of the subject-matters of the action:—*Held*, that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiffs were entitled to the costs of the issues on which they had succeeded, for that the costs ought in such a case to be taxed in the same manner as though the action had been tried out in the ordinary course of law. *Goutard* v. *Carr* (App.), 55

—— *costs: order LIV. rule* 12 (i): *order LVII. rules* 8, 11, *and* 15: *interpleader: jurisdiction of master*]—On the hearing of an interpleader summons before the Master the plaintiff withdrew his claim, whereupon an order was made barring his claim and directing the defendant in the action to pay the amount claimed to the plaintiff, less his own costs. The plaintiff appealed:—*Held*, that the Master had no jurisdiction over the costs of the action, as Order LVII. rule 15 only empowered him to deal with the costs of the interpleader proceedings before him, all other costs being by Order LIV. rule 12 (i) excepted from his jurisdiction. There being no jurisdiction in the Master to deal with the costs of the action, an appeal would lie against his order, notwithstanding section 49 of the Judicature Act, 1873, and rules 8 and 11 of Order LVII. *Hanson* v. *Maddox*. (*Yeo, claimant*), 67

—— *costs: right of appeal from order as to: good cause for order: action for recovery of land: rules of court*, 1883, *order LXV. rule* 1] —In an action for the recovery of several closes of land the jury gave a verdict for the plaintiff for about half the land claimed, and for the defendant for the remainder. The Judge before whom the action was tried ordered that the costs of both parties should be added together, divided equally, and that each party should pay half the total thus arrived at:—*Held*, that an appeal could be brought from this order, for that good cause must exist before the jurisdiction to make the order could arise, and that whether facts did or did not exist which would constitute good cause could be the subject of an appeal. *Held* also, that good cause did not exist in this case, and that the order ought to be set aside. *Jones* v. *Curling* (App.), 373

—— *costs: taxation: solicitor acting in his own cause: right to profit costs*]—A solicitor who successfully defends an action in person is entitled, upon taxation, to the same costs as if he had conducted the action as solicitor for some other person, and not merely to the costs to which a person, not a solicitor, suing or defending in person would be entitled: subject to this exception, that such costs are not to include items which the union of the two characters of solicitor and party renders impossible or unnecessary, such as instructions to or from himself or attendances upon himself. *The London Scottish Benefit Society* v. *Chorley* (App.), 551

Judgment of Divisional Court (*ante*, p. 272) affirmed.

—— *county courts: appeal by motion: motion ex parte or on notice: county court act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6: *order XXXIX. rules* 1–4: *order LII. rules* 2 *and* 3]—A County Court case brought on appeal by motion to the High Court is not "a cause or matter" within the meaning of Order XXXIX. rules 1–4, nor an "action" within Order LII. rule 2, and the procedure is not by way of notice of motion under those Orders, but by motion *ex parte* in the first instance under the County Court Act, 1875, s. 6, which is not superseded by the Rules of the Supreme Court, 1883. *Mathews* v. *Orey*, 439

Shapcott v. *Chappell* (*ante*, p. 77; Law Rep. 12 Q.B. D. 58) questioned. Ibid.

—— *debtors act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5: *appeal from order on debtor's summons: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 103 *and* 104: *jurisdiction of bankruptcy registrar*] The jurisdiction of the High Court under section 5 of the Debtors Act, 1869, has been, by virtue of section 103 of the Bankruptcy Act, 1883, and orders under it, assigned to the Judge in Bankruptcy, and the exercise of it delegated to the Bankruptcy Registrars. An

Practice (continued)—

appeal from an order of a Registrar, approved by the Judge in Bankruptcy, will therefore not lie to the Divisional Court, but will be regulated by section 104 of the Bankruptcy Act, 1883. *In re Lascelles; ex parte Genese*, 578

—— *discovery by interrogatories: security for costs: power of parties to dispense with deposit by consent: order XXXI. rules* 25 *and* 26]—A Judge is not bound to make an order dispensing with the deposit required by Order XXXI. rules 25 and 26, where discovery is sought by interrogatories, merely because the parties have consented that such an order shall be made. *Aste, Son & Kercheval* v. *Stumore, Weston & Co.* (App.), 82

—— *discovery by person not a party to the action: rules of court*, 1883: *order XXXVII. rule* 7]—By Order XXXVII. rule 7 of the Rules of Court, 1883, the Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person, for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial. *The Central News Co.* v. *The Eastern News Telegraph Co.*, 236

In an action brought by the plaintiffs against the defendants for an improper use and publication of certain telegrams transmitted by them to the plaintiffs, the defendants applied, under Order XXXVII. rule 7, for the production of certain documents belonging to and in the possession of the Electric News Telegraph Company, who were not parties to the action, with a view of shewing that the news contained in the telegrams had been communicated by the plaintiffs to such company, and by them made public prior to the time at which such news was published by the defendants. The defendants contended that the production of the documents in question would simplify the proceedings at the trial and save expense:—*Held*, that the power conferred on the Court was one which, if it existed, should be exercised with extreme caution, and that no sufficient ground had been shewn for the production of the documents asked for. Ibid.

—— *discovery: inspection: banking account: bankers' books evidence act*, 1879 (42 *Vict. c.* 11), *s.* 7]—In an action for goods sold and delivered, to which payment and a counterclaim were pleaded, the plaintiff, after issue joined, applied *ex parte* to a Judge at chambers, and obtained leave, under section 7 of the Bankers' Books Evidence Act, 1879, to inspect the defendant's banking account. The order was served on the defendant's bankers, and they, on receipt of it, informed the defendant, who thus heard of the order which had been made. The defendant took out a summons before the same Judge to set aside the order, and obtained a variation of it by which the inspection was limited to the period within which the goods were alleged to have been sold and delivered:—*Held*, that, under the circumstances, the plaintiff was not entitled to the order for inspection. *Davies* v. *White*, 275

Per DAY, J., that in civil proceedings an application for such an order for inspection ought not to be made *ex parte*; and *semble*, that the power to grant the order *ex parte* is limited to criminal proceedings. Ibid.

—— *garnishee order: default of appearance: "debt" attachable: interpleader issue: unliquidated claim: award after date of garnishee order*]—Judgment for the sum of 127*l.* was recovered against a person having a claim for unliquidated damages under a fire policy; and an *ex parte* garnishee order was served on the fire insurance company, attaching all debts owing or accruing from them to the assured. No cause was shewn against the order, and it was made absolute. The sum of 248*l.* was subsequently awarded to the assured on his claim after he had executed an assignment of all his property to trustees for the benefit of his creditors:—*Held*, that the garnishee order not having been appealed against and set aside, the judgment creditor, although the debt was not an attachable debt at the date of the order, was entitled to issue execution for 127*l.* under the garnishee order, and was not bound to interplead with the trustees to whom the debtor had assigned his interest under the award. *Randall* v. *Lithgow. The Equitable Fire Insurance Co.* (*garnishees*). *Green and another, claimants*, 518

—— *husband and wife: married women's property act*, 1882, *s.* 1, *sub-s.* 2: *tort committed before passing of act: right of wife to sue alone*]—A married woman is entitled under the Married Women's Property Act, 1882, s. 1, sub-s. 2, to bring an action in respect of a *tort* committed upon her during coverture before the commencement of the Act, without joining her husband as plaintiff. *Weldon* v. *Winslow* (App.), 528

—— *interpleader: motion for new trial in: to what court made: appeal from final judgment in: how brought: rules of court*, 1883, *order XL. rules* 3, 4 *and* 5: *order LVII. rules* 11 *and* 13]—Where an interpleader issue is tried by a Judge and a jury, the Judge can, by Order LVII. rule 13, finally dispose of the whole matter of the interpleader proceedings; and his judgment is final, unless leave to appeal is given. When in an interpleader issue a party desires to obtain a new trial, the application must be made to a Divisional Court. If in such a case it is desired to appeal from the final judgment of the Judge,

Practice (continued)—

leave must be obtained, and then that appeal lies to the Court of Appeal. If it is desired both to move for a new trial and to appeal from the final judgment of the Judge, then by Order XL. rule 5, both applications must be made, in interpleader as in other cases, in the first instance to a Divisional Court, from the judgment of which Court an appeal lies to the Court of Appeal. *Robinson* v. *Tucker* (App.), 317

Burstall v. Bryant (Law Rep. 12 Q.B. D. 103) overruled. Ibid.

—— *interpleader: service of summons out of jurisdiction: order LVII.*]—The Court has power to grant leave to issue an interpleader summons to be served on a foreigner resident out of the jurisdiction; and though such summons, if disobeyed, cannot be actively enforced, the Court can bar the claim of the foreigner refusing to submit himself to the jurisdiction. *Credito Gerundense (Lim.)* v. *Van Weede*, 142

—— *interpleader: security for costs: claimant and execution creditor: company in liquidation*]—In interpleader proceedings instituted by a sheriff, both the claimant and execution creditor are, in respect of security for costs, on the same footing as plaintiffs in ordinary actions. *Tomlinson* v. *The Land and Finance Corporation (Limited)* (App.), 561

A company in liquidation, although made defendants to the issue, may be ordered to give security for costs in interpleader proceedings instituted by a sheriff. Ibid.

—— *joinder of causes of action: irregularity: appearance: "fresh step" in the proceedings: order XVIII. rule 2: order LXX. rule 2*]—Appearance to a writ is a "fresh step" taken within the meaning of Order LXX. rule 2, and a writ which is irregular to the knowledge of the defendant cannot be set aside on his application after appearance. *Mulckern and another* v. *Doerks*, 526

—— *motion for new trial: excessive damages: power of court to reduce damages with consent of plaintiff*]—If the only ground upon which the verdict of a jury can be impeached is that the damages are excessive, the Court has power, with the consent of the plaintiff alone, to reduce the damages to such an amount as would not be excessive if it had been given by the jury. *Belt* v. *Lawes* (App.), 249

—— *order III. rule 6 (F): writ: special indorsement: action for recovery of land: landlord and tenant: mortgagor and mortgagee: attornment clause*]—A mortgage deed contained an attornment clause by which the mortgagor became tenant at will to the mortgagee of the land mortgaged, at a rent identical with the interest secured by the deed. The interest being in arrear the mortgagee gave notice to quit, and, failing to obtain possession, brought an action against the mortgagor for the recovery of the land:—*Held*, that the action was one "for the recovery of land by a landlord against a tenant whose term has expired" within Order III. rule 6 (F), entitling the plaintiff to indorse the writ specially with a statement of his claim under that rule, and consequently to apply for final judgment under Order XIV. *Daubuz* v. *Lavington*, 283

—— *payment into court: alternative defences: rules of court*, 1875: *order XXX. rule 1*]—Every payment of money into Court by a defendant to an action is a payment into Court under the Judicature Acts and the rules made under those Acts, and is a payment into Court by way of satisfaction of the cause of action in respect of which it is paid in. A defendant, therefore, who both pays money into Court, and sets up other defences to the same cause of action, is entitled to judgment in the action, if he succeeds in respect of the payment into Court, even though he fails on the other defences which he has set up. *Wheeler* v. *The United Telephone Co.* (App.), 466

—— *particulars: slander: names of publishees: slander by agent*]—In an action of slander in which publication by a third person, at the request and by the direction of the defendant, is alleged, particulars of the names of the alleged publishers may be ordered. *Bradbury* v. *Cooper*, 558

—— *receiver: reference to master to report: power of court to enquire into report: equity practice*]—Where a receiver has been appointed and certain questions have been referred to a Master of the Queen's Bench Division to report, the report of the Master, by analogy to the practice in the Chancery Division in respect to the certificate of a chief clerk, is not final and conclusive; the Court therefore has power to enquire into the accuracy or not of such report. *Walmsley* v. *Mundy. Ex parte Goodenough* (App), 304

—— *referee: power to make peremptory appointment for proceeding with reference: order XXXVI. rule 48*]—A referee, whether official or special, and whether he has to try a matter or report thereon, has power, subject to the control of the Court, to peremptorily appoint a day for the hearing of the reference, and, in the absence of either party, to proceed with the same. *The Baroness Wenlock* v. *The River Dee Co.* (App.), 208

Practice (continued)—

—— *remitted action: trial by judge without a jury: motion for new trial: 19 & 20 Vict. c. 108. s. 26: Order XXXIX. rule 1*]—Under the Rules of the Supreme Court, 1883, a motion for a new trial in an action remitted for trial to the County Court under 19 & 20 Vict. c. 108. s. 26, and there tried by the Judge without a jury, must be made before a Divisional Court, and not in the Court of Appeal. *The Swansea Co-operative Building Society* v. *Davies*, 64

—— *rules of supreme court, 1883: third party: contribution or indemnity: landlord and tenant: order XVI. rules 48 and 52*]—In an action for breach of a covenant to repair, the defendant, the lessee, sought to bring in his sub-lessee as a third party. The covenants in the original lease and in the sub-lease were identical, but there was an interval of eight years between the two leases, and there was no reference in the sub-lease to the original lease:—*Held*, on a summons for directions under Order XVI. rule 52, that the right of the defendant against the third party was not a right to "contribution or indemnity" within the meaning of Order XVI. rule 48. *Pontifex* v. *Foord*, 321

—— *service of writ out of jurisdiction: order XI. rules 1 (e) and 2: defendant domiciled in Scotland or Ireland: action for breach of contract*]—Order XI. rule 1 (*e*) has taken away the power of the Court to allow service of a writ out of the jurisdiction in actions for breach of contract within that rule, where the defendant is domiciled or ordinarily resident in Scotland or Ireland. *Lenders* v. *Anderson*, 104

—— *service out of the jurisdiction: third-party notice: person domiciled or ordinarily resident in Scotland or Ireland: order XI. rule 1 (g): indemnity: order XVI. rule 48*]—The issue of a third-party notice for service out of the jurisdiction under Order XI. rule 1, on a person domiciled or ordinarily resident in Scotland or Ireland will not be allowed. *Speller* v. *The Bristol Steam Navigation Co.* (App.), 322

Lenders v. *Anderson* (*ante*, p. 104; Law Rep. 12 Q.B. D. 50) followed. Ibid.

Clause (*g*) of that rule has no application to third-party notices. Ibid.

Per the Court of Appeal.—Leave to serve a third-party notice will not be given where a defendant claims to be entitled to indemnity over against a third party under Order XVI. rule 48, except where there is a contract express or implied on the part of such third party to indemnify the defendant. Ibid.

—— *third party: judgment against: refusing to state defence: order XVI. rule 52: judicature act, 1875, section 24*]—Judgment may be ordered, under Order XVI. rule 52, against a third party who has appeared after a third-party notice has been served on him, if the third party, on the hearing of an application for directions, declines to state any defence, and if the Judge is not satisfied that there is any question proper to be tried. *The Gloucestershire Banking Co.* v. *Phillips. Creagh, third party*, 493

Such judgment may be ordered against a married woman as a *feme sole* declaring her separate estate liable, although the liability was incurred prior to the passing of the Married Women's Property Act, 1882. Ibid.

Order XVI. rule 52 does not deprive the third party of any rights to which such party would have been entitled if sued by the defendant in the ordinary way, and is therefore not *ultra vires*. Ibid.

—— *third party: defence available to defendant: leave to defend: order XVI. rules 48, 49, 52, and 53*]—Where a third party has been properly brought in upon notice by the defendant, he is entitled to set up, as against the plaintiff's claim, any defence which would have been available to the defendant. *Callender* v. *Wallingford and Young, third parties*, 569

—— *transfer of action: vendor and purchaser: action for return of deposit: counterclaim for specific performance*]—An action by the purchaser of land for the return of his deposit-money, in which the defendant counterclaims for specific performance, should, if brought in the Queen's Bench Division, be transferred to the Chancery Division. *London Land Co. (Lim.)* v. *Harris*, 536

—— *witness: subpœna out of jurisdiction: reference of action and all matters in difference between the parties: trial: action depending in superior court: 17 & 18 Vict. c. 34. s. 1*]—Where an action and "all matters in difference" between the parties are by consent referred to a referee, the Court has no jurisdiction under 17 & 18 Vict. c. 34 to compel a person resident out of the jurisdiction to attend as a witness before the referee. The hearing of the reference is not a trial of an action depending in a Superior Court within the meaning of the statute. *Hall* v. *Brand* (App.), 19

—— *writ of attachment: jurisdiction of judge at chambers: judicature act, 1873, s. 39: order XLIV. rule 2: order LII. rules 1 and 2*]—A Judge at chambers has, since the Judicature Acts, power to order a writ of attachment to be issued against a person who is in contempt by reason of disobedience to a Judge's order: provided only that the application for such writ is made after due notice to the party against whom it is made, pursuant to Order XLIV. rule 2:—So *held* by GROVE, J., and HUDDLESTON, B. (DAY, J., dissenting). *Salm-Kyrburg* v. *Pomansky*, 428

Practice (continued)–

—— appeal: special case stated by Quarter Sessions: removal into Queen's Bench Division by *certiorari*: Highway Act, 1835 (5 & 6 Will. 4. c. 50), ss. 107 and 108: Judicature Act, 1873, ss. 19 and 45. *Illingworth* v. *The Bulmer East Highway Board* (M.C. 60), 224

—— Court of Appeal: jurisdiction to entertain appeal: case stated for opinion of Queen's Bench Division: Baines's Act (12 & 13 Vict. c. 45), s. 11: poor rate: interlocutory appeal: Judicature Act, 1873, s. 19. *The Mayor and Corporation of Peterborough* v. *The Parish of Wilsthorpe and the Assessment Committee of the Stamford Union* (M.C. 33), 178

—— writ of *mandamus*: return of unconditional compliance: pleading over: Rules of 1883 (Order LIII. rule 9, and Order LXVIII. rule 1). *Reg.* v. *The Justices of Staffordshire* (M.C. 159), 575

—— See BANKRUPTCY; HUSBAND AND WIFE; PLEADING.

Preference. See RAILWAY.

Prescription Act (2 & 3 *Will.* 4. *c.* 71), *s.* 2 *— right of way: easement: removal of wood cut at intervals: non-continuous user*]—Notwithstanding the rule against presumptions in section 6 of the Prescription Act, if a user for more than the statutory periods mentioned in that Act is proved, a non-user for more than a year within those periods from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory periods. But the total absence of user in each year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment, notwithstanding a temporary non-user. *Hollins* v. *Verney* (App.), 430

In an action for trespass on certain land belonging to the plaintiff, the defendants by their statement of defence pleaded a right of way, under section 2 of the Prescription Act, by reason of twenty years' user as of right. The right of way so claimed was in respect of the removal of timber over an ordinary metalled road, which led to some mills the property of the plaintiff, and passed for some distance alongside a wood which belonged to one of the defendants. There was a gate from this road into the wood, and the wood for about half a mile sloped sharply down to the road. At the end of the slope there was a way by which carts could pass from the road to the upper part of the wood. The timber on this slope was not cut at the same time, but at intervals of several years, the last cutting having been in the year in which the action was commenced, the previous cutting fifteen years before, and the next at another interval of fifteen years. At the time of such cuttings the road had been used as often as was necessary for the purpose of removing timber for a period of upwards of thirty years:—*Held*, affirming the judgment of the Queen's Bench Division (p. 30), that the claim in respect of the right of way did not satisfy the requirements of section 2 of the Prescription Act. Ibid.

Principal and Agent—*contract: betting: agent employed to make bets in his own name: repudiation of bet before payment: implied contract to indemnify*: 8 & 9 *Vict. c.* 109. *s.* 18]—The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's own name. After the plaintiff had so made some bets, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day the plaintiff, who was a member of Tattersall's, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connection with racing matters, and he then sued the defendant for the amount so paid:—*Held*, by BOWEN, L.J., and FRY, L.J. (BRETT, M.R., *dissentiente*), that he was entitled to recover the amount so paid. *Read* v. *Anderson* (App.), 532

—— *unnamed foreign principal: goods consigned by foreign agent to English consignee: insurance by consignee: loss: rights of parties to insurance moneys: factors act* (6 *Geo.* 4. *c.* 94), *s.* 1]—D. & Co., merchants in Havannah, consigned goods in their own names to the appellants, their correspondents in London, who insured them at the request of D. & Co. on behalf of all parties interested. In letters received by the appellants before they effected the insurances, D. & Co. mentioned that they were acting for an unnamed principal. They were, in fact, agents for the respondents, to whom the goods belonged. The goods were lost at sea, and D. & Co. shortly after became bankrupt. The appellants received the insurance moneys, but, before doing so, had notice that the respondents claimed them. The appellants claimed a lien upon the moneys for the whole amount due to them on their general account with D. & Co.:—*Held*, that, as against the respondents, they were entitled to a lien only for their charges in respect of the insurances; that the respondents could sue them for the balance; that it was immaterial to consider whether the contract between D. & Co. and the appellants was made under the law of Spain or the law of England, or whether there was any privity of contract between the appellants and the respondents, for that the respondents' right was not derived from the contract, but was a right of property consequent upon their property in the goods. *Mildred, Goyeneche & Co.* v. *Maspons y Hermano* (H.L.), 33

—— See COMPANY.

Prison Act, 1877 (40 & 41 *Vict. c.* 21), *s.* 36: *superannuation allowance or gratuity: compensation for removal from office: retirement to facilitate improvements in organisation: apportionment of compensation between rates and money provided by parliament: superannuation act*, 1859 (22 & 23 *Vict. c.* 26), *s.* 7] —The Treasury have power under the second and last clauses of section 36 of the Prison Act, 1877, coupled with section 7 of the Superannuation Act, 1859, to apportion between the rates and moneys provided for the purpose by Parliament an annuity payable to an officer who, being under sixty years of age and not incapable from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty of executing his office in person, has retired from office to facilitate improvements in the organisation of the department to which he belonged. *The Justices of Middlesex* v. *The Queen* (H.L.), 505

Privilege. See PARLIAMENT.

Probate Duty. See MANDAMUS; REVENUE.

Profits. See INCOME TAX; REVENUE.

Promissory Note—*payable on demand: consideration: agreement to pay money within three years: substitution of note for: debt in præsenti payable in futuro*]—Upon a dissolution of partnership an agreement was entered into which provided that the defendant, one of the partners, should pay the other partner a sum of 2,000*l.* within three years of the date of the agreement, with interest on the same, or on the instalments thereof for the time being unpaid, computed from the date of the dissolution of partnership. Subsequently the defendant gave to the other partner, at his request, a promissory note payable on demand for the same sum and bearing the same interest. In an action on this note by the executrix of the payee,—*Held*, that the plaintiff was entitled to recover, as there was good consideration for the promissory note, for that where there is a debt existing *in præsenti*, but payable within a period of time and not on a fixed day *in futuro*, so that the debtor is entitled to pay the sum owed at any time at his option, there is good consideration for a promissory note payable on demand given by the debtor and accepted by the creditor for the amount of that debt; and that such a case falls within the principle of the decision of the Exchequer Chamber in *Currie* v. *Misa* (44 Law J. Rep. Exch. 94). *Stott* v. *Fairlamb* (App.), 47

Property, Injury to. See ACTION.

Property Tax. See REVENUE.

Public Health—*water: house without proper supply: liability of owner for water rates on notice from local authority: public health act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 62]—The owner of a house who has failed to comply with the notice of the local authority to obtain a proper supply of water is liable under section 62 of the Public Health Act, 1875, "as if he had demanded a supply and were willing to pay water rates," to pay the water rates to the company which "furnishes the supply" by means of its mains in the street in front of his house, notwithstanding that no connection has been made between the house and the mains. *The Southend Waterworks Co.* v. *Howard*, 354

The local authority may make the connection and charge it to the owner, but their so doing is not a condition precedent to the chargeability of the owner for water rates. Ibid.

—— Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150 and 268: apportionment of expenses of work in street: summary proceedings: jurisdiction of justices of peace: appeal to local government board. *Regina* v. *The Recorder of Sheffield* (M.C. 1.), 72

—— keeping animals so as to be injurious to health: by-law: Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 44 and 276. *Heap* v. *The Burnley Union Rural Sanitary Authority* (M.C. 76), 375

—— See PENAL ACTION.

Quiet Enjoyment, Covenant for. See VENDOR AND PURCHASER.

—— See LANDLORD AND TENANT.

Railway—*dock company with railway: rolling stock and plant: liability of to be taken in execution: rights of debenture holders and execution creditor:* 30 & 31 *Vict. c.* 127. *ss.* 3, 4, *and* 23; 38 & 39 *Vict. c.* ccvii.]—A company was constituted by private Acts of Parliament for the purpose of making a dock with a short line of railway to connect the dock with other railways not belonging to the dock company:—*Held* (affirming the judgment of the Queen's Bench Division), that the undertaking was a railway within 30 & 31 Vict. c. 127. s. 3, which defines a company for the purposes of that Act to be a railway company—that is, a company constituted by Act of Parliament for the purpose of constructing a railway, either alone or in conjunction with any other purpose—and that lifting engines, cranes, and engines for supplying power to the cranes belonging to the company were rolling stock or plant within section 4 of that Act, and so not liable to be taken in execution by a judgment creditor. *The Great Northern Rail. Co.* v. *Takwardin & Co* (App.), 69

Railway (continued)

—— *railways clauses consolidation act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90: *grouping of rates: undue preference: action for overcharges: railway and canal traffic act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2 *and* 6]—No action can be maintained for a breach of section 2 of the Railway and Canal Traffic Act. *The Manchester, Sheffield and Lincolnshire Railway Co.* v. *The Denaby Main Colliery Co.*, 579

By the 90th section of the Railways Clauses Consolidation Act, 1845, a railway company may alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all goods "passing over the same portion of the line of railway under the same circumstances." In an action brought by the plaintiffs, a railway company, against the defendants, a colliery company, the latter counter-claimed for "overcharges" under the following circumstances. It appeared that the plaintiffs charged one uniform set of rates per ton for the carriage of goods from about forty-eight different collieries to a number of specified places lying eastward of those collieries and served by the railway. The defendants' colliery was the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the one of the group further from the defendants' colliery was fifteen miles. In consequence of the "grouping" arrangements the defendants were compelled to pay the same carriage rates as other members of the group whose coals were conveyed a considerably greater distance along the plaintiffs' line of railway:—*Held*, that the "group rates" were a violation of section 90 of the Railways Clauses Consolidation Act, 1845 (notwithstanding that the termini of the transit did not correspond), and that the defendants were therefore entitled to counterclaim for the difference between the amount actually paid by them for carriage of coal and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group. Ibid.

—— *special contract for carriage of goods at owner's risk: reasonableness: railway and canal traffic act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7]—The fact that there are ordinary rates in practical operation on a railway for the carriage of goods with ordinary liability is very strong evidence that an agreement between the railway company and a customer for the carriage of goods at another rate is reasonable. *The Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (H.L.), 124

A customer, having a *bona fide* alternative of sending his goods at ordinary rates, by a contract in writing agreed to free and relieve a railway company "from all liability for loss or damage by delay in transit, or from whatever other cause arising," in consideration of the company carrying his goods at a rate one-fifth lower than the ordinary rate:—*Held*, that the contract was reasonable, and relieved the company from liability from loss through delay in transit caused by the negligence of their servants. Ibid.

—— See FLOOD; NEGLIGENCE.

Rate, Alternative. See RAILWAY COMPANY.

—— **Water.** See PUBLIC HEALTH.

Rating—quinquennial valuation: supplemental valuation: "alteration": "preceding twelve months": evidence: Valuation (Metropolis) Act, 1869 (31 & 32 Vict. c. 67), ss. 46 and 47. *Reg.* v. *The East and West India Docks Company* (M.C. 20), 57

Real Actions. See RENT-CHARGE.

Realty, Trust of. See HUSBAND AND WIFE.

Realty and Personalty. See REVENUE.

Receiver. See PRACTICE.

Receiving Order. See BANKRUPTCY.

Referee. See PRACTICE.

Reference. See PRACTICE.

Register. See COPYRIGHT.

Registration. See MUNICIPAL CORPORATION PARLIAMENT.

Release. See RENT-CHARGE.

Renewal of Lease. See LESSOR AND LESSEE.

Rent-charge—*action of debt: liability of owner of part of lands charged: recovery of arrears of rent-charge: abolition of real actions*: 3 & 4 *Will.* 4. *c.* 27. *s.* 36]—The defendant was the owner and occupier of a portion of certain lands in the parish of P., which by a private Act were charged with the payment to the vicar of an annual sum of 270*l.* in lieu of all tithes. The Act provided that if the annual rents were in arrear, the vicar was to have such and the same powers and remedies for recovering the same as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also that, if no sufficient distress was found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual

Rent-charge (continued) –

rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands :—*Held*, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action of debt, having been abolished by 3 & 4 Will. 4. c. 27. s. 36. *Held further*, that the defendant had his remedy in an action against the co-owners for contribution. *Christie* v. *Barker*, 537

Thomas v. *Silvester* (42 Law J. Rep. Q.B. 237) followed. Ibid.

—— *annuity : release : contribution :* 22 *&* 23 *Vict. c.* 35. *s.* 10]—G. died in 1875, having devised copyhold land to W. G. charged with an annuity to the plaintiff. On the 24th of July, 1876, W. G. contracted to sell part of the land to the defendant, and on the 31st of July, 1876, W. G. surrendered the residue of the land in fee to W., and the plaintiff by deed released the land surrendered to W. from the annuity. In 1883 the plaintiff sued the defendant for arrears of the annuity : —*Held*, that the plaintiff could not recover, the right of the defendant to hold his portion of the land freed from the annuity being preserved by the saving clause of 22 & 23 Vict. c. 35. s. 10. *Booth* v. *Smith*, 425

—— See PARLIAMENT.

Revenue—*income tax : annual profits : surplus income of burial board : charitable purpose : business carried on by ratepayers :* 5 *&* 6 *Vict. c.* 35 (*property tax act*, 1842), *s.* 60]—A burial board, formed under Act of Parliament, and empowered to charge fees in accordance with a scale approved by a Secretary of State, were directed, after satisfying all the liabilities of the board with reference to the execution of the Act in or for the parish, and providing such a balance as should be deemed by the board sufficient to meet their probable liabilities during the then next year, to pay over, at the time of the annual meeting, any surplus money there might be to the overseers, in aid of the poor rate of the parish :—*Held*, that such surplus was assessable to the income tax, being, in effect, a profit made in a business carried on by the ratepayers for the benefit of themselves, and fell within section 60 of the Property Tax Act, 1842 (5 & 6 Vict. c. 35). *The Burial Board of the Parish of Paddington* v. *The Commissioners of Inland Revenue*, 224

—— *income tax : marine, fire, and life insurance : life policy holders : premiums : duty on bonus fund : gains and profits*]—The respondents were an insurance company, and carried on three branches of business—namely, marine, fire, and life insurance—under one management. The results of the business in the three departments were thrown together into one account, called the "profit and loss account," and dividends were declared out of the balance of this account, and not out of the profits made in the particular departments. The respondents' liabilities were discharged partly out of premiums and partly out of income arising from invested funds, which in the management of this business were allocated to the marine, fire, and life departments, and were known as the marine, fire, and life funds :—*Held*, that, for the purposes of assessment to income tax, the business of the company, being substantially one business, was to be dealt with as a whole and not as three separate businesses. *Held*, further, that additions made by the respondents to the life fund out of annual income were not liable to income tax as gains or profits. *Last* v. *The London Assur. Corporation*, 325

The respondents in the life department issued policies of a participating character, which were issued at premiums calculated to cover, not only all risk and expense, but also to yield a considerable surplus over and above company profits, two-thirds of which were by the terms of the policies to be apportioned among the policy holders, and the remaining one-third was to be applicable for the benefit of the company. This surplus was determined quinquennially by ascertaining actual results and calculating contingencies, and the two-thirds distributable to participating policy holders made up a fund which was distributed either in cash payments or by way of reduction of premiums or by addition to the amounts insured :—*Held*, by DAY, J. (*dissentiente* SMITH, J.), that the fund appropriated for distribution by way of bonus among policy holders did not constitute gains or profits to the respondents so as to be assessable to income tax. Ibid.

—— *income tax : profits : statutory restriction : corporations*]—The appellants, a corporation created by Act of Parliament for the management of the Mersey Docks, derived a considerable income from dock dues and other payments for dock and harbour accommodation. A local Act appropriated the income to certain enumerated purposes, not including the payment of income tax, and provided that it should not be applied "for any other purpose whatsoever" : - *Held*, that income tax was payable on the profits of the undertaking. *The Mersey Docks and Harbour Board* v. *Lucas* (H.L.), 1

The local Act required the surplus income, after payment of working expenses, interest on debt, and cost of certain authorised works, to be applied in reducing the principal of the debt, and after the extinction of the whole debt the rates levied were to be reduced :—*Held*, that such surplus income was profits assessable for income tax. Ibid.

Revenue (continued)—

—— *probate duty: real property forming part of partnership assets: agreement to convert: effect of will dealing with it as realty*]—Certain land and premises were held as part of the property of a partnership. The partners considered this property to be realty, and, in answer to an information claiming probate duty on the value of the share held by one of the partners who had died, it was alleged that it had been agreed between them that the deceased should make a will dealing with this property as realty, that the will was submitted to and approved of by the other partner, and then duly executed and proved, and therefore that there had been a re-conversion of that part of the partnership property into realty, and that it was not liable to probate duty:—*Held*, affirming the judgment of the Queen's Bench Division, that the property was liable to probate duty; that even if such an agreement as that alleged was contemplated, there was no evidence of any binding enforceable agreement which would take effect in the lifetime of the testator so as to take the property in question out of the partnership assets and thus reconvert that into realty which, being partnership property, is considered for the purposes of fiscal duties to be personalty. *The Attorney-General* v. *Hubbuck* (App.), 146

—— *property tax: assize courts: 5 & 6 Will. 4. c. 35: 16 & 17 Vict. c. 34*]—Property tax, under schedules A and B of the Income Tax Acts, is not payable in respect of buildings erected by county Justices, and vested in the clerk of the peace of the county, to be used as assize courts with their appurtenances and a county police station, notwithstanding that they may have been occasionally lent gratuitously for the holding of meetings or for other like purposes. *Coomber* v. *The Justices of the County of Berks* (H.L.), 239

Revocation of Authority. See PRINCIPAL AND AGENT.

—— **Power of.** See ARBITRATION.

Right of Support—*injury caused by interference with: successive subsidences caused by one excavation: cause of action: statute of limitations*, 21 *Jac. 1. c. 16. s. 3*]—The plaintiff owned the surface of certain land under which the defendants had worked the coal down to, but not since, 1868. In 1871 part of this surface subsided, and the plaintiff's houses were thereby injured. The defendants then, by agreement, repaired the injured houses. In 1882 a fresh subsidence took place, although the defendants had not worked the coal since 1868, nor had they done anything whatever under the plaintiff's land since that date. This subsidence caused injury to certain other houses belonging to the plaintiff, and he brought an action to recover damages for the injury so caused. The defendants relied on the Statute of Limitations, alleging that the cause of action accrued in 1871, when the first subsidence took place:—*Held*, that the plaintiff was entitled to recover, for that the subsidence causing damage was the cause of action, that each fresh interference with the plaintiff's right to support which affected the enjoyment of his property gave rise to a fresh cause of action, and therefore that the plaintiff's claim, which was based on the subsidence in 1882, was not barred by the Statute of Limitations. *Mitchell* v. *The Darley Main Colliery Co.* (App.), 471

Lamb v. *Walker* (47 Law J. Rep. Q.B. 451) overruled. Ibid.

Whitehouse v. *Fellowes* (30 Law J. Rep. C.P. 305) approved. Ibid.

Ritual. See CHURCH.

Road. See TRAMWAYS ACT.

Sale, Particulars of. See VENDOR AND PURCHASER.

School Board—*power of to recover by action unpaid fees in arrear: implied contract: action on statute: Elementary Education Acts* (33 *& 34 Vict. c. 75. ss. 17, 74, 92*; 39 *& 40 Vict. c. 79, ss. 4, 10, 11, 12*; 43 *& 44 Vict. c. 23. s. 2*)]—A school board has no power to recover by action fees unpaid and in arrear from the parent of a child who has attended one of the Board schools and who has received education therein. *The School Board for London* v. *Wright* (App.), 266

A parent who does not send with the child the school fees which are required to be paid does not cause that child to attend school within the meaning of the Education Acts. Ibid.

Saunders v. *Richardson* (50 Law J. Rep. M.C. 137) approved. Ibid.

Scotland, Writ in. See PRACTICE.

Seaman's Certificate. See SHIP AND SHIPPING.

Security for Costs. See PRACTICE.

Separate Estate. See HUSBAND AND WIFE.

Separation Deed. See HUSBAND AND WIFE.

Servitude. See FLOOD.

Set-off. See CONTRACT.

Sewers—commission of: liability to repair *ratione tenuræ*: extraordinary storm: presentments: orders: 3 & 4 Will. 4. c. 22. ss. 13 and 46. *Reg.* v. *The Commissioners of Sewers for the Levels of Fobbing* (M.C. 113), 574

Shares. See COMPANY.

Sheriff—*equitable interest: duty of sheriff to seize: common law procedure act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 13: *rules of court*, 1883, *order LVII. rule* 12]—Where a sheriff, having seized goods under a writ of *fi. fa.*, withdrew without interpleading, and returned *nulla bona* on finding that they were assigned under a bill of sale to another person, and where in the event the goods proved to be worth more than the sum for which they were so assigned,—*Held*, that the execution creditor could not maintain an action against the sheriff, for that section 13 of the Common Law Procedure Act, 1860, does not give the sheriff power to seize such an equitable interest of the execution debtor as alone existed in this case. *Scarlett* v. *Hanson* (App.), 62

—— *execution: notice of receiving order before sale: "costs of execution": "poundage": bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46]—The "costs of execution" mentioned in section 46, sub-section 1, of the Bankruptcy Act, 1883, do not include the sheriff's "poundage." *In re William and John Ludford. Official Receiver* v. *The Sheriff of Warwickshire*, 418

Semble,—"Poundage" is included in the "costs of execution" mentioned in sub-section 2 of the same section. Ibid.

Ship and Shipping—*bill of lading: indorsement by shipper as security for an advance: transfer of property in goods: liability of indorsee for freight: bills of lading act* (18 & 19 *Vict. c.* 111), *s.* 1]—N. having shipped goods in London, in a vessel belonging to the plaintiffs, to be carried to Russia, obtained from the defendants a loan, and, as security for the advance, indorsed to them the bill of lading of the goods so shipped. The goods arrived in Russia, and on being sold there in accordance with the Russian law, realised only enough to satisfy the custom-house charges. Thereupon the plaintiffs sued the defendants for the freight and charges, on the ground that the property in the bill of lading of the goods had passed to the defendants within the meaning of the Bills of Lading Act, and that the defendants were therefore liable as indorsees of the bill of lading:—*Held*, by BRETT, M.R., and BAGGALLAY, L.J. (*dissentiente* BOWEN, L.J.), that the defendants were liable to the plaintiffs for the freight and charges claimed, inasmuch as the *bona fide* indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee. *Burdick* v. *Sewell* (App.), 399

—— *bill of lading: liability of shipowner: damage to cattle: ship not reasonably fit for carriage*]—The plaintiff shipped on board the defendant's steamer some cattle to be carried from London to New York, upon the terms of a bill of lading, by which it was agreed "that the defendants, their agents or servants, should, as respects the cattle in question, be in no way responsible for either their escape from the steamer, or for accidents, disease, and mortality, and that under no circumstances should they be held liable for more than 5*l.* for each of the animals." It appeared that the defendants' ship had had on board, on the voyage immediately preceding that by which the plaintiff's cattle were carried, certain cattle affected with foot and mouth disease, which the plaintiff's cattle caught owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the ship before the cattle were received on board and the bill of lading signed. The plaintiff in consequence sustained damage amounting to more than 5*l.* for each of the said cattle:—*Held*, that the stipulation in the bill of lading related to the carriage of the cattle upon the voyage, and in no way affected the primary obligation of the shipowner to provide a ship reasonably fit for their reception on board. *Tattersall* v. *The National Steamship Co.* (*Lim.*), 332

—— *charter-party: carriage of deck cargo at merchant's risk: loss by jettison: general average contribution*]—The plaintiffs, as charterers of a vessel of which the defendants were owners, shipped a deck cargo of timber under a charter-party which contained a stipulation that "the vessel should be provided with a deck cargo, if required, at full freight, but at merchants' risk." During the voyage a portion of the deck cargo was necessarily and properly jettisoned in order to save the ship and the rest of the cargo:—*Held*, that the stipulation did not exclude the right of the charterers to recover general average from the shipowners for the loss sustained: for the jettison was effected by the master, acting in the interest of all concerned, and not as servant of the shipowners. *Burton & Co.* v. *English & Co.*, (App.), 133

Judgment of the Queen's Bench Division (52 Law J. Rep. Q.B. 386) reversed. Ibid.

—— *charter-party: construction of: demurrage: frosts preventing loading*]—By a charter-party it was agreed that a ship should proceed to Cardiff East Bute Dock and there load from the agents of the freighters a cargo of iron; the cargo was to be supplied as fast as steamer could receive at all hatchways; "time to commence from the vessel being ready to load . . . . and ten days on demurrage over and above the said lay days at 40*l.* per day (except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading, . . . in which case the owners to have the option of employing the steamer

Ship and Shipping (continued)—

in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship)." The ship arrived in dock and commenced loading; but subsequently canals through which part of the cargo had to pass became blocked with ice, and in consequence a stoppage occurred of five days in the loading. The frost would not have prevented the loading had the cargo been ready at the dock, but the cargo could not have been brought to the dock otherwise than by the canals without unreasonable expense:—*Held*, that there was no frost "preventing the loading" within the exception, and that the charterers were liable for demurrage. *Grant & Co.* v. *Coverdale, Todd & Co.* (H.L.), 462

—— *charter-party: final sailing: last port*]—Where a ship has left her port, ready for her voyage, and for the purpose of proceeding on her voyage, without intending to come back, she must be taken to have "finally sailed," although she may afterwards have been driven back by stress of weather. *Price* v. *Livingstone* (App.), 118

A charter-party provided that the ship should take in a cargo at P. Dock, Cardiff, and proceed to Bombay, and that an advance of one third of the freight should be made to the owners within eight days "from final sailing of the vessel from her last port in the United Kingdom." The ship took in her cargo and was towed seven or eight miles out at sea, where, owing to bad weather, she anchored. She was afterwards driven from her anchorage and drifted back into the port of Cardiff. The cargo was jettisoned, and she afterwards took in another. The ship had never been beyond the limits of the port of Cardiff, as defined for fiscal purposes, though she had left the port in its ordinary commercial sense:—*Held*, that she had "finally sailed from her last port." Ibid.

—— *general average: port of refuge: expenses of reloading and outward port charges*]—When a vessel goes into a port of refuge in consequence of a particular average loss, the expenses of reloading the goods unloaded only for the purpose of repairing the injury, and the expenses incurred for pilotage and other charges in leaving port, are not the subject of general average. So *held*, *per* BRETT, M.R., and BOWEN, L.J. (BAGGALLAY, L.J., *dissentiente*). *Svensden* v. *Wallace* (App.), 385

Judgment of LOPES, J. (52 Law J. Rep. Q.B. 396), reversed. Ibid.

—— *general average: towage contract binding on shipowners: liability of cargo owners to contribution*]—The captain of the plaintiffs' ship *A.*, which had run aground on a bank in the river Y. in China, signalled for assistance to the ship *S.*, which belonged to other owners. The assistance was rendered, and both ship and cargo were saved, although with much risk to both ships. At the time when the assistance was rendered there was an agreement in existence amongst the owners of the different ships trading in the river not to render assistance to ships in distress for a less sum than 2,500*l.*, which was to be paid for services, whether beneficial or not, rendered for a period not exceeding twenty-four hours. The plaintiffs paid that sum to the owners of the *S.* In an action to recover a general average contribution from the owners of part of the cargo so saved, the jury found that the captain of the ship *A.* had signalled for assistance, knowing the terms upon which it would be rendered, that he had pursued a reasonable course in so doing, and that, under the circumstances, the sum of 2,500*l.* was a reasonable sum:—*Held*, that the captain of the ship *A.* had entered into a towage contract which was binding on his owners, and which, under the circumstances, gave rise to a claim for general average contribution, in respect of which the defendants were liable. *The Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (App.), 161

—— *marine insurance: policy on goods: contract of sale: free on board: loss of goods: non-appropriation of goods at time of loss: vesting of property: insurable interest*]—The plaintiff claimed to recover from the defendant, an underwriter at Lloyds', under a floating marine policy on goods, in respect of certain sugar lost on the 4th of February, 1881, on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff (a merchant at Bristol) and B. & Co. as hereinafter mentioned. By the first contract, dated the 7th of January, 1881, D. & Co. agreed to sell to B. & Co. 200 tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at 21*s.* 9*d.* per ton net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the 12th of January, 1881, D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the 7th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of 200 tons of sugar at an advanced price; neither was the plaintiff aware that D. & Co. were the shippers of the 200 tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price which left the plaintiff a

Ship and Shipping (continued)—

clear profit. D. & Co. advised their Hamburg forwarding agents that they had sold 400 tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co.'s forwarding agents at Hamburg shipped 3,900 bags only, and advised D. & Co. of this short shipment, proposing to sent the 100 bags short-shipped by the next steamer. The 3,900 bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co.'s agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole 3,900 bags were shipped in one undistinguished mass, consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the 3rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co., in due course, took up the bills of lading, and then proceeded to apportion the 3,900 bags, appropriating 2,000 of such bags to B. & Co., and the remaining 1,900 to the plaintiff, and making out invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co.; but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the 200 tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these 200 tons. Upon receipt of the invoices, the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the 2,900 bags so invoiced. The plaintiff then also declared upon his floating policy for this further loss:—*Held*, that inasmuch as the plaintiff was liable to pay for the sugar, lost or not lost, he had such an insurable interest as would entitle him to recover in respect of the loss under a policy on "goods." *Stock* v. *Inglis* (App.), 356

Judgment of FIELD, J. (52 Law J. Rep. Q.B. 30), reversed. Ibid.

—— *marine insurance: policy: construction: "at the wreck"*]—A policy of insurance was effected on salvage pumps insured "from the 30th of December, 1882, to the 12th of January, 1883, . . . whilst engaged in salvage operations at the wreck of the *C*," "including all risk whilst being conveyed from B. to $\frac{\text{and}}{\text{or}}$ on board the wreck." It was shewn that the *C.* was floated by means of the pumps which were brought from B. and placed on board her, and that she was kept afloat by the pumps, and that she partly steamed and partly was towed by another vessel for a distance of nearly forty miles, until she had almost reached B., the nearest port of safety, when she sank in deep water, with the salvage pumps on board, on the 4th of January, 1883:—*Held*, that the loss was not covered by the policy. *Difiori* v. *Adams*, 437

—— *merchant shipping act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 172, *&c.: penalty: withholding seaman's certificate: compensation: right of action apart from statute*]—The Merchant Shipping Act, 1854, ss. 172 and 524, imposes a penalty not exceeding 10*l.* upon any master of a ship who fails to sign and give a certificate of discharge to a seaman specifying the period of his service and the time and place of his discharge, such penalty to be applied, if the Justices think fit, in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. *Vallance* v. *Falls*, 459

The plaintiff, a seaman, brought an action against the defendant, a master of a ship, for damages sustained through the defendant's withholding a certificate of discharge:—*Held*, that the action was not maintainable, inasmuch as the duty was created for the first time by 17 & 18 Vict. c. 104. s. 172, and a particular remedy was conferred by that statute. Ibid.

—— See MARINE INSURANCE.

Slander. See PRACTICE.

Solicitor — *attachment: non-compliance with order for payment of money: debtors act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4]—Where an order on a solicitor for payment of a sum of money is intended to be a punitive order for the purpose of punishing the solicitor for misconduct, the Court will order an attachment to issue against him for non-compliance therewith. *In re Dudley; ex parte Monet* (App.), 16

—— *bill of costs: signature:* 6 & 7 *Vict. c.* 73. *s.* 37: *"assignee"*]—An assignee of costs due to a solicitor signed and delivered a bill of the costs:—*Held*, that such signature satisfied 6 & 7 Vict. c. 73. s. 37, as being

Solicitor (continued) –

signature by an "assignee" within the meaning of the section; which enacts that "no . . . . solicitor, nor any executor, administrator or assignee of any . . . . solicitor, shall" sue for costs "for any business done by such . . . . solicitor until . . . . one month after" delivery of a bill of such costs "subscribed with the proper hand of such . . . . solicitor, . . . or of the executor, administrator or assignee of such . . . . solicitor," or accompanied by a letter so subscribed. *Ingle* v. *McCutchan*, 311

—— *charging order: "money preserved": money paid into bankruptcy court to abide result of a counter-claim: 23 & 24 Vict. c. 127. s. 28*]—In an action in the High Court the defendant counter-claimed for money due from the plaintiff, and also took proceedings in bankruptcy against the plaintiff. The bankruptcy proceedings were stayed, on payment of 300*l.* into the Bankruptcy Court, to abide the result of the action. The action and all matters in dispute were referred, and an award made in the plaintiff's favour. The plaintiff's solicitor applied for a charging order on the 300*l.* for his costs. The Divisional Court declined to make the order, on the ground that it had no power to do so, and also that no sufficient merit had been shewn. *Pierson* v. *The Knutsford Estate Co.* (App.), 181

Semble, per GROVE, J.,—That the charge, if made, would take priority over a mortgage, although such mortgage had been made with the cognisance of the solicitor to prevent his client becoming bankrupt. Ibid.

Held (by the Court of Appeal), that the money was not "property preserved" within the meaning of section 28 of 23 & 24 Vict. c. 127, inasmuch as the right to it depended on the discretion of the Bankruptcy Court, which might be affected by circumstances outside the litigation. Ibid.

—— *lien: charging order: garnishee order: priority: solicitors act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28]—A plaintiff who had recovered judgment on his claims issued a *fi. fa.* in execution; and the amount of debt and costs was paid to the sheriff in redemption of the goods seized. On the day after such debt and costs were so paid, a creditor who had obtained a judgment against the plaintiff in the County Court took out a garnishee summons to attach the money in the hands of the sheriff. Two months afterwards the plaintiff's solicitor obtained a charging order on the sum in the sheriff's hands. On the return of the garnishee summons, this charging order was shewn to the County Court Judge, who thereupon refused to make any order on the garnishee summons. The judgment creditor then applied to set aside the charging order by summons in chambers, and SMITH, J., made an order setting it aside:—

Held, on appeal, that the solicitor's charging order had priority of the debt to the judgment creditor, and must stand. *Dallon* v. *Garrold. Ex parte Adams*, 527

—— See PRACTICE.

Specific Performance. See PRACTICE.

Stage Plays—Theatres Regulation Act (6 & 7 Vict. c. 68), s. 2: place of public resort: public performance in private theatre. *Shelley* v. *Bethell* (M.C. 16), 41

Statute, Action on. See SCHOOL BOARD.

Statutory Remedy. See SHIP AND SHIPPING.

Street—*expense of paving: liability of adjoining owners: local authority: towns improvement clauses act*, 1847 (10 & 11 *Vict. c.* 34), *ss.* 3 *and* 53]—The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), enacts, in section 53, that "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged or otherwise made good," the local authority may pave, &c., such street at the expense of the adjoining owners; and "thereafter such street shall be repaired" out of the rates. The interpretation clause enacts that "the word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act." In 1857 a special Act was passed, incorporating the above provisions amongst others of 10 & 11 Vict. c. 34, and in 1864 a provisional order applied it to P. In 1875, the plaintiffs, the corporation of P., widened, by agreement with the adjoining owners, a public highway within the limits of the special Act, and then made it good at their own expense, pursuant to the agreement; but they did not then pave or flag it. In 1880, the plaintiffs, acting as the local sanitary authority, paved and flagged the footpath at the side of this road, and then sought to recover the expense of so doing from the defendants, as the owners of adjoining lands:—*Held*, that the defendants were not liable, the road having been otherwise made good in 1875, so that the expense of paving done since that date could not be charged upon the adjoining owners. *The Mayor &c. of Portsmouth* v. *Smith and others* (App.), 92

Held also, by BRETT, M.R., and BOWEN, L.J., that the time to which the word "theretofore" referred was the date of the passing of the special Act; by BAGGALLAY, L.J., that it was the date when the work was done. Ibid.

—— **Property in.** See METROPOLIS LOCAL MANAGEMENT ACT.

Subpœna. See PRACTICE.

Superannuation. See PRISON ACT.

Surface, Support to. See MINES.

Tacking. See BUILDING SOCIETY.

Taxation. See PRACTICE.

Telephone Wire. See METROPOLIS LOCAL MANAGEMENT ACT.

Tenancy in Common — *house: liability for repairs: holding over after the expiration of a lease from one tenant in common, and the purchase of the interest of the other*]—One tenant in common of a house is not entitled to recover from another tenant in common, in virtue of their relation, money laid out in the repair of the house, but not for the purpose of preventing the destruction of the subject-matter of the tenancy. *Leigh* v. *Dickeson*, 120

The assignee of a lease from a tenant in common seised of an undivided three-fourths of a house, which assignee afterwards purchased the one-fourth share of the other tenant in common, and continued in possession of the house after the lease had expired, *held* liable to pay to the lessor, by way of use and occupation, the rent reserved in the lease, his occupation of three-fourths of the house being, in view of the correspondence, referable to his character as tenant on sufferance after the expiration of the lease, and not to his character as tenant in common. Ibid.

Third Party. See PRACTICE.

Time. See BILL OF SALE.

Tithes. See RENT-CHARGE.

Title, Covenant for. See VENDOR AND PURCHASER.

Tort—non-joinder. See PRACTICE; HUSBAND AND WIFE.

Towage. See SHIP AND SHIPPING.

Towns Improvement Act. See STREET.

Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, *and* 55: *liability for non-repair of road and tram-line: contract with road authority: negligence*] — Where, in pursuance of the powers given by section 29 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), a tramway company had contracted with the road authority for the maintenance by the latter of the road and lines for a fixed annual payment,—*Held*, that the effect of such contract was to transfer to the road authority the liability which would otherwise have been cast upon the company for damage occasioned by the road being out of repair. *Howitt* v. *The Nottingham and District Tram. Co.* (*Lim.*), 21

Transfer of Action. See PRACTICE.

Traveller. See INN.

Trial. See PRACTICE.

Trust. See HUSBAND AND WIFE.

User. See PRESCRIPTION.

Uses, Statute of. See PARLIAMENT.

Vendor and Purchaser — *covenants for quiet enjoyment and title: disturbance: right of common over waste lands: decree establishing right*]—The defendant sold certain waste land to the plaintiff. The conveyance contained a covenant for title, and also one for quiet enjoyment, "notwithstanding any act or thing done or suffered by the defendant, or by any of his predecessors in title." Subsequently a decree was made in a suit in equity, to which the plaintiff was not a party, although representing one of a class of persons who were defendants in that suit, by which it was declared that the land so conveyed was subject to a general right of common over it:—*Held*, that the decree, in the absence of any entry or other act, was not a disturbance of the plaintiff's right of possession so as to constitute a breach of the covenant for quiet possession. *Held* also, that a grant of such right of common by some predecessor in title of the defendant would not be inferred in the absence of evidence of such a grant, and that consequently there was no breach of the covenant for title. *Howard* v. *Maitland* (App.), 42

—— *particulars of sale: error in description of property: condition for compensation: power to recover after conveyance taken*]—The particulars of certain freehold property sold by auction misstated the value of the rental, and the purchaser, relying on the statement, purchased the property for a sum higher than its real value or than he would otherwise have given. The contract of purchase contained a condition that if any error should be discovered in the particulars compensation should be allowed. The purchaser did not discover the error until after the purchase-money was paid and until after he had accepted the conveyance of the property. The conveyance

Vendor and Purchaser (continued)—

contained no covenant relating to this matter:—*Held* (affirming the judgment of the Queen's Bench Division, p. 78), that the purchaser was entitled to recover compensation, and that the acceptance of the conveyance did not bar his right to such compensation. *Palmer* v. *Johnson* (App.), 348

Cann v. *Cann* (3 Sim. N.S. 447) and *Bos* v. *Helsham* (36 Law J. Rep. Exch. 20) approved. Ibid.

Manson v. *Thacker* (47 Law J. Rep. Chanc. 312), *Besley* v. *Besley* (Law Rep. 9 Ch. D. 103) and *Allen* v. *Richardson* (49 Law J. Rep. Chanc. 137) dissented from. Ibid.

—— See BUILDING SOCIETY; PRACTICE.

Voting. See MUNICIPAL ELECTION.

Water. See FLOOD; PUBLIC HEALTH.

Water Company—*water rate, how calculated: "annual value"*]—A water company was required by a special Act of Parliament to supply water for houses in its district at certain rates "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district." A later Act altered the scale of rates and fixed them at a percentage on the "annual value." It also enacted that, except as expressly provided therein, "this Act shall not repeal, alter, interpret, or in any manner affect," the provisions of the earlier Act:—*Held*, that the provisions of the earlier Act, if and so far as they differed from those of the later Act, were abrogated and might be disregarded. That "annual value" in the later Act meant "net annual value," calculated in the same way as by law "rateable value" is required to be calculated for the purpose of assessing poor's rates. *Dobbs* v. *The Grand Junction Waterworks Co.* (H.L.), 50

—— *water rendered deleterious in service-pipe: property in service-pipe: waterworks clauses act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 35 *and* 48: *local act*, 32 & 33 *Vict. c.* cx. *ss.* 66 *and* 71: *by-laws, effect of*]—The corporation of H. were empowered by a private Act, which incorporated the Waterworks Clauses Acts, 1847 and 1863, to supply water for domestic purposes. Section 35 of the Act of 1847 provides that undertakers of waterworks shall provide and keep in the pipes to be laid down by them a supply of wholesome water. Section 48 provides that occupiers of dwelling-houses may, on making certain payments and getting certain consents, lay leaden or other pipes from the mains into their premises. The local Act enables the corporation to make by-laws for preventing waste, misuse, or contamination of the water; and provides, in section 71, that the corporation shall not be bound to lay down service-pipes, but may do so by agreement with and at the expense of the occupier. One of the by-laws provides that the connecting pipes shall be deemed to belong to the corporation. The plaintiff was injured by using water which had, though pure when in the mains, become contaminated from passing through the leaden service-pipe which had been laid down by the defendants at his request and expense. In an action for damages for the injury so caused,—*Held*, that the defendants were not liable; that the leaden service-pipe was not their property; and that they had fulfilled their statutory duty by having pure and wholesome water in their mains. *Milnes* v. *The Mayor, &c., of Huddersfield* (App.), 12

Water Rates. See LANDLORD AND TENANT.

Way, Right of. See PRESCRIPTION.

Will—*construction of: loan by testator to son in lifetime: advances by testator to be taken in satisfaction of share: advancement: hotchpot*]—A testator bequeathed the whole of his personalty to trustees, with a direction that his widow should receive the net annual income thereof, and, subject to the preceding direction, the trustees were to hold the trust property for the absolute use of all his children equally. Then followed this proviso:—"I declare that any advances made by me to any child in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child in my private memorandum-book, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property." One of the sons had had a loan of 2,500*l.* from his father, for which he gave a promissory note, and on which, or on so much of it as had not been repaid, he paid interest during his father's lifetime. At his father's death, leaving the widow surviving, the amount shewn by the memorandum-book to be outstanding against this son was 2,000*l.*:—*Held*, that the widow was entitled to receive during her life, as part of the annual income given her by the will, interest on the 2,000*l.*, and that the son was not entitled to treat the debt as gone or the amount as converted into a gift at the date of the testator's death, but must wait till the death of the widow, when the proviso as to the division of the shares under the will would take effect. *Limpus* v. *Arnold*, 415

—— **by feme covert.** See HUSBAND AND WIFE.

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Erratum.

In the case of *Hansen* v. *Maddox* (*Yeo, claimant*), at page 67, the head-note should begin thus:—"On the hearing of an interpleader summons before the Master, the *claimant* withdrew his claim."

The counsel for the plaintiff in the case was *Mr. Rose-Innes*, not Mr. R. G. Glenn.

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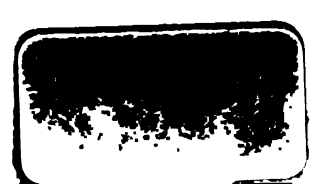
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